Supreme Court, U. S.
FILED
APR 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1505

MARSHALL P. SAFIR,
Petitioner,

—vs.—

JUANITA M. KREPS, Individually, and as Secretary of Commerce, et al.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MARSHALL P. SAFIR
Pro Se
41 Flatbush Avenue
Brooklyn, New York 11217
Tel. No.: 212-858-2700

TABLE OF CONTENTS

Appendix A—Opinion of the Court of Appeals, District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2050

MARSHALL P. SAFIR,

Appellant,

—v.—

JUANITA M. KREPS, Individually and as Secretary of Commerce, *et al.*

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 74-1474)

Argued October 27, 1976

Decided February 11, 1977

Marshall P. Safir, appellant *pro se*.

Richard A. Olderman, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *William Kanter*, Attorney, Department of Justice, were on the brief, for federal appellees. *Barbara L. Herwig*, Attorney, Department of Justice, also entered an appearance for federal appellees.

Robert T. Basseches and *Daniel H. Margolis*, with whom *Warren L. Lewis* was on the brief, for intervenors-appellees. American President Lines, Ltd., Prudential Lines, Inc., and PSS Steamship Company, Inc. *Verne W. Vance* was on the brief for intervenor-appellee Farrell Lines, Inc.

J. Franklin Fort, with whom *T. S. L. Perlman* and *William H. Fort* were on the brief, for intervenors-appellees Lykes Bros. Steamship Lines, Inc. and Moore-McCormack Lines, Inc.

James N. Jacobi was on the brief for intervenor-appellee American Export Lines, Inc.

Elmer C. Maddy was on the brief for intervenor-appellee United States Lines, Inc.

Before WRIGHT, MCGOWAN, and MACKINNON, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: This case involves the most recent episode in a ten-year battle by appellant, Marshall P. Safir, to force the United States Government, acting at various times through the Maritime Subsidy Board, the Maritime Administrator, and the Secretary of Commerce, to recover construction differential subsidies and operating differential subsidies paid to various shipping companies collectively called the Atlantic and Gulf American Flag Berth Operators (AGAFBO). At this stage in the proceedings appellant has won decisions in the Second Circuit forcing the Maritime Administrator to take action on appellant's claims, *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969) (*Safir I*), and further holding that

the AGAFBO lines are estopped from relitigating a finding of the Federal Maritime Commission that the lines engaged in predatory behavior against appellant's steamship company, Sapphire Steamship Lines, Inc., *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970) (*Safir II*), *Safir I* also established that Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970), which prohibits payment of subsidies to lines engaging in predatory practices, also allows the United States to seek recovery of subsidies paid to shipping lines during the period of their predatory behavior but before it is discovered. *Safir I* at 977. The Maritime Subsidy Board has now rendered an opinion, *Investigation of Alleged Section 810 Violation*, 3 Maritime Subsidy Board Reports 128 (1973) (interim order), Supp. App. 160, —— Maritime Subsidy Board Reports ——, 14 P & F SHIPPING REGULATION REPORTS 77 (1973) (final order), JA 33, requiring various amounts of operating differential subsidies to be recovered from lines in direct competition with Sapphire Steamship Lines, Inc. (the "Trade intervenors"), but exonerating certain other AGAFBO members (the "Non-Trade intervenors"). This decision was appealed by the AGAFBO lines to the Secretary of Commerce who, in an order dated September 9, 1974, JA 2, affirmed the Board in all respects except that he further mitigated the amount of subsidy to be recovered from the Trade intervenors.[1]

Directly at issue here is an order of the District Court denying appellant's motion for summary judgment and granting appellees' and intervenors' motions for sum-

[1] Further elaboration of facts of this case may be found in *Safir I* and *Safir II*.

mary judgment.[2] We reverse and remand this case to the District Court for further proceedings as indicated in this opinion.

At the outset, a word is in order about the general approach which ought to be taken to this case. As all parties are well aware, the administrative proceedings sought to be reviewed here would never have been instituted in the absence of the Second Circuit's decision in *Safir I*. And, although that court did not order the precise form of proceedings which have been conducted here,[3] it indicated that comparable proceedings would have been ordered in the absence of voluntary action intended to discharge the obligation of the Maritime Administrator "to make a considered decision whether to recover the subsidies paid in the past," *Safir I* at 978. *See Safir II* at 144. The vagaries of the form and venue of proceedings for judicial review of administrative action should not, therefore, be allowed to obscure the fact that the central issue here is whether the mandate of the Second Circuit has been discharged. Nor should the discontinuous nature of the judicial proceedings or the change of forum from New York to Washington cloud the fact that we are here dealing for all practical purposes with a single continuing lawsuit. For this reason we think it inappropriate to reopen issues which have been resolved by the Second Circuit unless there has been a supervening change of law or fact which makes the prior resolution of an issue plainly erroneous.

---

[2] Appellees also made motions to dismiss. All motions before the District Court were treated as motions for summary judgment, *see* Order of Judge Bryant, JA 1, and we adopt this nomenclature herein.

[3] *See* pp. 13-14, *infra*.

I

We now take up *seriatim* issues raised by the intervening Trade and Non-Trade Lines and the Secretary of Commerce in support of their respective motions for summary judgment. We deal here only with those points raised on appeal, assuming that points raised below but not pressed here have been abandoned by the parties.

1. *Appellant's Standing*. The standing issue has already been litigated in *Safir I*, a suit brought by three parties: appellant Safir, his partner Arnold Weissberger, and Sapphire Steamship Lines. Read literally, that opinion affords standing only to Sapphire. *See Safir I* at 977. However, we think such a limited construction is unwarranted. The only evidence of an essential point—that Sapphire "ha[d] not washed [its] hands of the business," *id.* at 978—was Safir's affidavit that "he desired to return to the shipping business as soon as possible." *Id.* Nor do we think much can be made of the characterization of Sapphire as the "victim" of the predatory practices since it is now clear, as it apparently was not at the time of *Safir I*, that Sapphire's financial losses have been transferred at least in part to Safir in his capacity as personal guarantor of many of Sapphire's debts. Moreover, we find no evidence at all that the Second Circuit intended to distinguish between the corporate entity—Sapphire—and its co-owners for purposes of standing. If it had intended to do so, it should have dismissed the claims of both appellant Safir and his partner Weissberger in *Safir I* and again in *Safir II*, but this it did not do. We hold, therefore, that *Safir I* established as of 1969 appellant's standing to sue to force the Maritime Administrator to make a "considered decision" on whether to seek recoveries. We further hold

that implicit in the grant of standing in *Safir I* is a further grant of standing to seek judicial review of the decision of the Administrator (or Secretary of Commerce) once it was made.

Our inquiry is not finished by an examination of the scope of *Safir I*, however, because there has been a major clarification of the meaning of standing under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), since *Safir I* was decided. In *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Supreme Court announced a two-part test for standing to challenge administrative action: first, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," *id.* at 152; and, second, "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *id.* at 153. Subsequent cases put a gloss on these requirements. Of particular importance here is the decision in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), in which the Court added the requirement that "the plaintiff who seeks to invoke judicial power stand to profit in some personal interest [if he wins the suit]." 426 U.S. at 39.

Although the *Safir I* court did not phrase its standing opinion in the above terms, we think Safir's standing under subsequently announced law nonetheless follows from what was said in *Safir I*. *Safir I* holds that Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970), was intended by Congress "to promote the competitive interest of a victim by authorizing the recovery

of subsidies improperly paid in the past * * *." *Safir I* at 978. From this language it is clear that, if Safir still has a competitive interest, it is one within the "zone of interests" protected by Section 810, and the second *Data Processing* standing requirement is met. The Second Circuit's analysis of the congressional history of Section 810 also establishes that Congress thought potential competitors would benefit from recovery of subsidy payments since such recovery "poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him." *Id.* at 977 (footnote omitted). We do not think either *Data Processing* or *Simon* requires appellant to demonstrate the truth of the above proposition. It is enough if Congress thought a victim would "profit" through recovery of illegally paid subsidies and consequently failure of the Maritime Administrator to extend the intended benefit to a victim is injury in fact. Again, however, Safir must continue to be a potential competitor of the shipping lines which illegally took the subsidies if he is to benefit from a decision to recover such subsidies.

For the foregoing reasons, the three standing issues come down to one: Is Safir a potential competitor of the Trade and Non-Trade Lines? We begin by restating that *Safir I* established that Safir had this status in 1969. *See* pages 4-5 *supra*. Appellant's desire to re-enter the shipping business has apparently not changed, *see* Complaint ¶ 3, Supp. App. 250, and appellees and intervenors here have pointed to no change in circumstances which would cause us to question the conclusion of the Second Circuit that "an interruption of operations like that here does not sufficiently alter the victim's interest to take it

out of the protection of § 810 * * *." *Safir I* at 978. Moreover, for us to hold today that the Secretary of Commerce can divest a person in appellant's position of standing simply by footdragging would scarcely serve the interests of Congress or the Constitution. After all, the Secretary's initial and allegedly continuing unwillingness to protect Safir's interests may well be a contributing factor to Safir's inability to re-enter the shipping business—certainly Congress (in the Second Circuit's view) thought that prompt termination and recovery of subsidies would be of material assistance to the victim of predation. Nor do we see how any Article III purpose would be served by refusing Safir a forum in which he might contest the adequacy of the Secretary's compliance with an unquestionably valid order of the Second Circuit, especially where the only apparent ground for such refusal would be delay caused by the very dilatoriness of the Secretary and the Administrator which led to the initial suit. For all of the above reasons, therefore, we decline to hold that the passage of time has removed appellant's standing to prosecute this action.[4]

2. *Exhaustion of Administrative Remedies.* The United States argues that appellant Safir's failure to participate in the review proceedings before the Secretary of Commerce should act as a bar to relief in the District Court. We disagree, finding this argument to be prematurely raised.

It appears that appellant participated fully in the proceedings before the administrative law judge (ALJ)

[4] Because we hold today that *Safir I* established appellant Safir's personal standing to bring suit, we need not consider the effect of § 70 of the Bankruptcy Act, 11 U.S.C. § 110 (1970), on appellant's claim.

and the Maritime Subsidy Board in Docket No. S-243, which is here under review. Upon entry of the final order of the Board, appellant turned to the District Court for review. Intervenors, on the other hand, petitioned the Secretary of Commerce for further administrative review of the Board's order under procedures set out in 46 C.F.R. § 202.1 (1976). The Secretary granted intervenors' petitions and, as a result, the District Court dismissed Safir's complaint as premature. *Safir* v. *Dent*, No. 2156-73 (D. C.D. May 9, 1974), *aff'd*, No. 74-1716 (D.C. Cir. Feb. 18, 1975) (Supp. App. 246, 256).

The failure of Safir to appear before the Secretary does not in itself require dismissal of this petition for review. Administrative review before the Secretary is nowhere made mandatory. It is a matter of grace, not right, as the language of the regulation itself evidences: "The Secretary * * * *may*, on his own motion or on the basis of a petition filed as hereinafter provided, review any decision, report and/or order of the Maritime Subsidy Board * * *." 46 C.F.R. § 202.1 (¶ 6.01) (emphasis added). In addition, there is no requirement that parties participate in any review proceedings that the Secretary has established. Although all parties of record are served with the petitions for review, the regulation states that parties so served "*may* file replies in writing there to," *id.* (emphasis added), not that they must. Finally, there can be no doubt that Safir has protected his right to seek judicial review by filing a complaint in the District Court which would have been timely but for its ultimate prematurity.

Nonetheless, appellant is not free to raise points without regard to whether they were argued at some stage of the administrative process. While an exhaustion requirement is not codified in the Merchant Marine Act,

it is a generally recognized common law principle. *See, e.g.*, 3 K. Davis, Administrative Law Treatise § 20.01, at 56-57 (1958); L. Jaffe, Judicial Control of Administrative Action 424 (1965). The purpose of exhaustion—to allow an agency "to consider [a] matter, make its ruling, and state the reasons for its action," *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946), so that it will have "an opportunity to correct [any] error, if error there be," *Brotherhood of R.R. Trainmen* v. *Chicago, M., St. P. & Pac. R. Co.*, 380 F.2d 605, 608 (D.C. Cir.), *cert. denied*, 389 U.S. 928 (1967) —is narrow, however. So long as the appellant or some other party has put an objection on the record, the obligation to exhaust is discharged. This is especially so at the stage of secretarial review since such review is carried out on the record already made. In particular, the Secretary must be charged with notice of objections raised in prior administrative or judicial proceedings.

Applying this principle to the issues raised on this appeal, we hold that there has been no demonstration that appellant has failed to raise below all issues now in contention. As we understand the present state of affairs, all appellant Safir has so far proffered for decision is the narrow question whether there was any room under Section 810 for discretionary reduction of amounts of operating and construction subsidies to be recovered. *See* Plaintiff's Motion for Summary Judgment, Supp. App. 267-268. Sarfir's second claim—that the Secretary has abused his discretion—is not presently before the District Court and could not properly be so since the administrative record has not yet been filed with that court. On the narrow issue of discretion, there can be no doubt that the Secretary and every party here had adequate

notice of Safir's contentions. These contentions were the subject of *Safir I* and *Safir II*. The briefs in these cases were certainly available to the Secretary since his agent, the Maritime Administrator, was a defendant in both suits. The opinions of the Second Circuit are a matter of public record and well known to all involved. It appears that Safir also presented these claims to the ALJ and to the Maritime Subsidy Board. *See Investigation of Alleged Section 810 Violation, supra*, 3 Maritime Subsidy Board Reports at 141, Supp. App. 181. What more, then, was there to be said by a non-lawyer about the appropriate construction of Section 810?

There will be more than enough opportunity to raise waiver issues again once the trial court has the administrative record before it and can assess the possibility of prejudice in terms of the actual argument and evidence adduced before the ALJ and the Board. If actual prejudice appears at that time, the trial court is free to reconsider the waiver issue including any extenuating circumstances which would make imposition and exhaustion requirement inequitable.

3. *Collateral Estoppel or Res Judicata.* We agree with appellees' position that appellant may not relitigate questions that were actually decided in either *Safir I* or *Safir II*. We disagree, however, with appellees' contention that the holdings of these cases are sufficiently broad to warrant dismissal of appellant's complaint. Two issues were raised in *Safir I*: whether Safir had standing, and, if so, whether the Administrator's decision not to seek refunds of subsidies paid was a matter "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2) (1970) and therefore unreviewable. Both issues were decided in Safir's favor; however, only the second is

relevant here. On the discretion point the *Safir I* court held that the Maritime Administrator could not "refuse to proceed against AGAFBO lines without at least considering the interest of the victim, about which Congress was so concerned," and that he "was at least required to make a considered decision whether to recover the subsidies paid in the past." *Safir I* at 978. *Safir I* thus indisputably rejected the Administrator's extreme position that his decision whether or not to seek recovery was unreviewably committed to his discretion. This holding is consistent with the supervening case of *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), and consequently we do not inquire further into it.

Safir I, in addition to rejecting the Administrator's claim of unreviewable discretion, specifically reserved the question whether "there may be other limits on [the Administrator's] discretion" going beyond the requirement that he consider the victim's interest before deciding not to seek recovery of subsidies paid. *Safir I* at 978. However, when in *Safir II* appellant sought to test these limits by arguing that the Administrator had no discretion to do other than seek recovery of all subsidies paid to all AGAFBO members, this extreme position was rejected. In a footnote the Second Circuit stated:

> Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Safir II at 145 n.2. The propriety of the Administrator's considering "the nature and extent of the individual carriers' participation" was reiterated on rehearing. *Safir II* at 146. As matters now stand, therefore, the District Court properly rejected appellant's sole contention on his motion for summary judgment that "the Secretary of Commerce, through his constituent agency, the Maritime Administration—Maritime Subsidy Board, is under a mandatory duty to impose the inflexible [*sic*] sanction of Section 810 * * * to recover all construction and operating subsidies paid * * *." Supp. App. 268.

Nevertheless, the District Court could not properly dismiss Safir's complaint as a whole since that complaint is not limited to the sweeping claim that the Secretary lacked any discretion to demand recovery of less than the full amount of subsidies paid.[5] It alleges that the Maritime Subsidy Board and the Secretary abused whatever discretion they may enjoy by arbitrarily and capriciously mitigating the penalty assessed against AGAFBO, *see* Complaint ¶¶2, 5, 6.b, Supp. App. 249, 251, and particularly questions the propriety of the Secretary's further mitigation of recoveries,[6] which was based solely on Government complicity in (and benefit from) the predatory act of the AGAFBO lines, *see id.* ¶ 6.b, Supp. App. 251. Litigation of this and other issues raised by Safir's

---

[5] Appellant apparently sought to resolve by summary judgment only issues which could be decided without examination of the administrative record, an approach ultimately sanctioned by the District Court when it consolidated and then stayed the actions brought by intervenors herein. *See* Order of April 10, 1975 (Docket Item No. 32).

[6] Order of the Secretary of Commerce in Maritime Subsidy Board Docket S-243, Sept. 9, 1974, JA 2.

complaint, such as the propriety of reducing subsidy recovery to reflect the proportion of military cargo carried by the predatory lines, and hence in direct competition with Sapphire Steamship Lines, Inc.,[7] is not barred. The propriety of considering such factors could not have been litigated before the Second Circuit because the orders announcing the Administrator's reliance on them were not entered until after *Safir II*. Therefore, such issues are plainly open now no matter what theory of estoppel is applied to the Second Circuit's decisions. Moreover, consistent with our view that what is really at issue here is the Administrator's (Secretary's) discharge of the Second Circuit's mandate, the general issue of the arbitrariness of the precise action taken is and must be open for review now, regardless of any discretion which the Administrator may enjoy. *See Citizens to Preserve Overton, Park Inc.* v. *Volpe, supra.*

II

From what we have said above it should be clear that there are issues to be tried on remand. In particular, it is necessary for the trial court to determine whether the various factors other than the "extent of individual carriers' participation in the illegal action," *Safir II* at 145 n.2, cited by the Administrator and the Secretary as justifying mitigation can properly be considered, given the purpose and legislative history of Section 810 and its construction in other cases. In other words, the issue reserved by the Second Circuit in *Safir I*—the precise limits on the Administrator's (Secretary's) discretion not to seek recovery of all subsidies paid—must now be decided. If it is decided that all the cited factors could

[7] *Investigation of Alleged Section 810 Violation*, 3 Maritime Subsidy Board Reports 128, 161-167 (1973), Supp. App. 216-223.

lawfully be considered, the trial court must further determine whether the Administrator (Secretary) acted arbitrarily or capriciously, or abused his discretion in this case, given the facts developed in the hearing before the ALJ. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra; Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

If it becomes necessary for the District Court to review the facts found by the Maritime Subsidy Board or the Secretary, it will first have to determine whether the appropriate standard of review is substantial evidence on the record as a whole, *see* 5 U.S.C. § 706(2)(E), or whether the facts found must merely be free of arbitrariness or caprice, given the evidence adduced, *see Dunlop* v. *Bachowski, supra*. In making this determination, the trial court should be aware of the unusual procedural posture of this case. The hearings before the ALJ were begun "to provide a basis for recommending to the Maritime Subsidy Board * * * the appropriate action that should be taken" in response to the order of the Second Circuit in *Safir I*. *See* Maritime Subsidy Board Order in Docket S-243 at 3 (Oct. 24, 1969). Ultimately, however, a final order was entered which purports to conclude an adjudication of the amounts owing. *See Investigation of Alleged Section 810 Violation*, —— Maritime Subsidy Board Reports ——, —— (1973), JA 45-46. While there is some sanction for this form of procedure in *Safir II* at 144, we would not have thought that a formal adjudication was required to discharge the obligation put on the Administrator in *Safir I*. *Cf. Dunlop* v. *Bachowski, supra*. In addition, no statutory provision has been called to our attention which would authorize the Secretary, Administrator, or Board to adjudicate what Judge Friendly characterized as a contract dispute. *See Safir I* at 977. Because no one has objected to the procedures adopted and because this decade-long

litigation has already consumed more than enough judicial and administrative time, however, we would be strongly inclined simply to ignore the procedural anomalies of this litigation and assume with the parties that the proper procedure is quasi-adjudicative and consequently the proper standard of review is substantial evidence on the record as a whole. Nonetheless, since this is a case of first impression and since the parties have not yet addressed the standard of review issue, we leave the determination of the appropriate standard to the trial court for further examination.

III

While we do not wish to prejudge issues more properly decided by the District Court on remand, efficiency does require us to indicate our views on one issue. The opinion of the Secretary is a document remarkable for its brevity. Brevity, however, while the soul of wit, can be the bane of judicial review. This is the case here with the Secretary's Order further reducing amounts to be recovered solely because of Government participation in and benefit from the lowering of rates to non-competitive levels. *See* Order of the Secretary of Commerce in Maritime Subsidy Board Docket S-243, JA 2. His Maritime Subsidy Board found, however, "that at best [Government] pressure was a relatively minor consideration in the trade respondents' rate reductions." *Investigation of Alleged Section 810 Violation, supra,* 3 Maritime Subsidy Board Reports at 144, Supp. App. 185. This conclusion rests on many factors, among which we find particularly persuasive testimony of the shippers' own officials that such pressure was not a factor causing rates to be reduced, *see id.* at 148 & n.36, Supp. App. 193, and the Board's astute observation that

> if the trade respondents were bowing to unrelenting pressure from the military for rate reductions,

> it is a curious mystery why AGAFBO members let its condemned reduced rates revert to former high levels in the very teeth of such pressure.

Id. at 148-149, Supp. App. 193. When these detailed and plausible findings of the Board are compared to the peremptory announcement of the Secretary that "the record indicates that the United States Government actively induced the rate reductions here in issue," JA 2, the conclusion is virtually compelled that the Secretary has simply failed to come to grips with the difficulties in the evidence in the record. Certainly the Secretary's failure to identify the evidence in support of his reversal of the Board gives little assurance that we have been presented with an order resulting from a reasoned decision-making process. Because of this unexplained inconsistency between the findings of the Secretary and of the Board, the trial court should carefully scrutinize the evidentiary support for the Secretary's ruling and should, if necessary, remand the record to the Secretary for clarification of his reasons for interpreting the evidence as he has. *See Camp* v. *Pitts,* 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 415-416.

IV

For the reasons stated above, the order of the District Court is reversed and this case is remanded for further proceedings consistent with this opinion.[a]

Reversed and remanded.

---

[a] Further appellate consideration of the issues raised here would be greatly facilitated if the District Court would reinstate its order of consolidation entered in Nos. 74-1474, 74-1788, and 75-0077 on March 5, 1975 (Docket Item No. 29), which was modified on April 10, 1975 (Docket Item No. 32), so that the contentions of all parties can, in the future, be disposed of at one time.

Appendix A—Opinion of the Court of Appeals,
District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2050

September Term, 1976

Civil Action No. 74-1474

MARSHALL P. SAFIR, *Appellant*

v.

JUANITA M. KREPS, Individually

and as Secretary of Commerce, *et al.*

Before WRIGHT, MCGOWAN, and MACKINNON, Circuit Judges.

Order

It is ORDERED by the court that the opinion in the above entitled case filed this day, February 11, 1977, be and it hereby is amended as follows:

> On page 9, line 17 of the first full paragraph, insert before the comma: "and pursued all mandatory review procedures"

Per Curiam
For the Court
GEORGE A. FISHER
Clerk

United States Court of Appeals
For the District of Columbia Circuit
Filed Feb. 11, 1977
GEORGE A. FISHER
Clerk

Appendix B—Brief for Plaintiff-Appellant
Dated November 26, 1975

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Docket No. 75-2050

Civil Action No. 74-1474 Consolidated with 74-1788 and 75-0077 on Appeal from the United States District Court for the District of Columbia.

MARSHALL P. SAFIR,
Plaintiff-Appellant,

—v.—

FREDERICK DENT, Secretary of Commerce, et al.,
Defendants-Appellees,

AMERICAN EXPORT LINES, INC., et al., and
AMERICAN PRESIDENT LINES, et al.,
Intervening-Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

MARSHALL P. SAFIR, Pro Se
Plaintiff-Appellant
41 Flatbush Avenue
Brooklyn, N. Y. 11217

November 26, 1975

TABLE OF CONTENTS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Docket No. 75-2050

MARSHALL P. SAFIR,
Plaintiff-Appellant,

—v.—

FREDERICK DENT, Secretary of Commerce, et al.,
Defendants-Appellees,

AMERICAN EXPORT LINES, INC., et al.,
AMERICAN PRESIDENT LINES, et al.,
Intervening-Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

Questions Presented

I.

Whether, after affirming the determination of the Maritime Subsidy Board in Docket S243 that Section 810 of the Merchant Marine Act, 1936 had been violated, the Secretary of Commerce has discretion consistent with the statute to recover less than the sum total of all public subsidy monies claimed by the offending recipient contractors during the 11 month period of violation and improperly paid under Titles V and VI of the Act.

II.

Whether the Secretary and the Maritime Subsidy Board in construing Section 810 as a penal statute and thus subject to mitigation of penalties acted arbitrarily and not in accordance with law.

III.

Whether the Secretary and the Maritime Subsidy Board in *retrospectively* establishing a refund rule for the assessment of retroactive penalties exceeded their authority by inappropriate exercise of their rule making powers.

References to Parties and Rulings

The action that plaintiff-appellant prays the Court to review and vacate is an order of the United States District Court for the District of Columbia, Bryant, *J.*, dated October 21, 1975 (attached hereto as Appendix A) rejecting review of an order of the Secretary of Commerce dated September 9, 1974 (attached hereto as Appendix B).

The order of the Secretary of Commerce was in response to a petition for review of an order of the Maritime Subsidy Board in Docket S243 dated October 15, 1973 (Reported at Pike & Fisher 14SRR-77) implementing refund rules for a purported recovery of subsidy.

The refund rules were promulgated with a finding of violation of Sec. 810 by the MSB on April 16, 1973. Reported at Pike & Fisher 13 SRR 809.

Plaintiff is an individual, former chief executive of Sapphire Steamship Lines, Inc., owner of 50% of its stock and personal guarantor of certain of its obligations.

Defendant is the Secretary of Commerce and as such responsible for administering the Merchant Marine Act,

1936 through his constituent agency the Maritime Administration/Maritime Subsidy Board.

Intervening defendants are eight[1] American Flag steamship operators whose actions in concert against Sapphire Steamship Lines, Inc. were found by the MA/MSB and the Secretary of Commerce to have violated Sec. 810 of the MMA of 1936.

The genesis of all litigation of this matter, including this action, was a determination by the Federal Maritime Commission that from March 29, 1965, to March 1, 1966, AGAFBO set rates "reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire", thereby violating among others section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814. *Rates on U.S. Government Cargoes*, Docket No. 65-13, 11 F.M.C. 263, 287 (1967).

On the strength of this determination plaintiff Safir prosecuted the following proceedings:

1. *Sapphire Steamship Lines, Inc., et al.* v. *James W. Gulick, et al.*, N.D. Cal. Civ. No. 48985, began March 29, 1968, seeking a declaration that section 810 of the Merchant Marine Act, 1936, 46 U.S.C. 1227, made illegal the payment of subsidy to AGAFBO members during such violation, and seeking an injunction forbidding defendants from paying such subsidy. This was voluntarily dismissed and the same plaintiffs began

2. *Marshall P. Safir, et al.* v. *James W. Gulick, et al.*, E.D.N.Y. Civ. No. 68C643, began June 24, 1968, seeking substantially the same relief, plus a mandatory injunction

[1] At the time of the violation in 1965-1966 there were nine operators. Since that time two of them Prudential S.S. Lines and Grace Lines—have merged.

compelling defendants to recover subsidies illegally paid. From a dismissal on all counts, *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y. 1969), plaintiffs appealed and in

3. *Safir, et al.* v. *Gibson, et al.*, 417 F.2d 972, 978 (2d Cir. Sept. 26, 1969), secured a holding that:

> 1. Plaintiffs had standing to question the Secretary's unwillingness to seek recovery of subsidy.
>
> 2. The Maritime Administration was "required to make a considered decision whether to recover the subsidies paid in the past" to AGAFBO members found by the Federal Maritime Commission to have violated section 15 of the Shipping Act, 1916, and a remand. Whereupon the Maritime Subsidy Board initiated

4. *In the matter of the complaint of Sapphire Steamship Lines, Inc. re alleged violation by . . . (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended*, Docket No. S-243, begun October 24, 1969 (Docket S-243). It is of the order of the Secretary of Commerce served in this Docket S-243 that appellant Safir, here seeks review and set aside of this retroactive recovery formula.

Plaintiff-appellant Safir then resorted to the courts on three subsequent reported occasions:

5. In *Safir, et al.* v. *Gibson, et al.*, 432 F.2d 137, 145 (2d Cir. 1970), *cert. denied*, 400 U.S. 850 (1970), Sapphire and Safir secured a mandate to "the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire," thus making the Federal Maritime Com-

mission's determination in its Docket 65-13 under section 15 of the Shipping Act, 1916, conclusive upon the Secretary in Docket S-243 under section 810 of the Merchant Marine Act, 1936.

6. In *Safir, et al.* v. *Gibson, et al.*, 330 F. Supp. 225 (E.D.N.Y. 1971), Sapphire and Safir obtained an injunction barring any further disbursement of operating-differential subsidy for the violation period March 31, 1965, to March 1, 1966, unless and until the Maritime Administration determined the entitlement thereto of AGAFBO members or otherwise insured recoverability thereof.

Statutes

(a) Merchant Marine Act, 1936 as amended (hereafter MMA '36) 49 Stat. §§ 1985ff, 46 U.S.C. 1101ff, particularly Sec. 501(a) 46 U.S.C. § 1152 authorizing the payment by the United States under certain conditions of Construction Differential Subsidy for construction of merchant ships for American Registry; § 601, § 602, and § 603, 46 U.S.C. 1171, 1172, 1173, authorizing payment under certain conditions of operating differential subsidy for the operation of such ships and *most particularly* sec. 810, 46 U.S.C. 1227 mandating the bar of all subsidy payments to violators of said section.

(b) The act originally known as the False Claims Act RS § 3490, 5348; 31 U.S.C. § 231, § 232.

(c) Administrative Procedure Act, 5 U.S.C. § 551ff [hereafter (APA)] particularly sec. 7-5 U.S.C. § 553, § 556(e) requiring rules and orders to be based on the record and supported by and in accordance with the reliable probative and substantial evidence and sec. 10e 5 U.S.C. 706 requiring the reviewing Court to compel

agency action unlawfully withheld and to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, short of statutory right, unsupported by substantial evidence or without observance of procedure required by law.

Statement of the Case

This appeal is the culmination of an eight year effort beginning in December 1967 to recover for the United States public subsidy funds improperly paid in the past to violators of Section 810 of the MMA 1936.

The Maritime Subsidy Board decisions in Docket S-243 of April 16, 1973—reported in Pike & Fisher Vol. 13 SRR at 809 and its final decision on "recoveries" of October 10, 1973 reported in Pike & Fisher Vol. 14 SRR at p. 7 set forth the history of the case to that point.

On September 9, 1974 Secretary of Commerce Frederick Dent issued a final order in the case after a petition for review of the MSB action had been filed by the offending ocean carriers who had been found by the MSB to have violated Sec. 810 in concert.

The Secretary's order confirms the finding of violation against all eight petitioners.

Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, which provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water,

or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

Confronted with this language the Maritime Subsidy Board decided that it had discretion if it found mitigating circumstances to establish a refund rule in 1973 to apply to the 1965-1966 violation. The Board then formulated its rule which in the words of Judge Dooling of the E.D.N.Y., "appears to measure out forfeitures equal to the part of each cost subsidy allocable to the cargo on which the offending rates were made." (See App. C).

The Secretary in his order affirmed the concept of the rule and found further mitigation in order on the theory that Federal officials, in an excess of zeal, induced the offenders to take the illegal predatory acts against the unsubsidized victim.

He then reduced the refund by 50% of the MSB formula on this new finding which had previously been rejected by both the Administrative Law Judge and the Board. Further adjustment downward of the assessed "recovery" would make it up to the offenders for what he felt the Federal officials did to *them!!*

Plaintiff-appellant then filed a petition for review in the District Court under APA moved for summary judgment on the abuse of discretion for an order to reverse and set aside his order.

Judge Bryant without opinion denied and dismissed the action.

ARGUMENT

I.

The recovery of the subsidy funds improperly disbursed is mandatory upon the Secretary and does not fall under the exception "by law committed to agency discretion."

Under the teachings of the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 *et seq.* 1971, Plaintiff submits that there are *no* grounds consistent with the statute which would permit the Secretary of Commerce, after a finding of violation of Section 810, any discretion to refuse to invoke the sanction of the statute to recover at least the CDS and ODS subsidies improperly paid out during the period of violation.

In "Overton Park," the relevant statute provided that the Secretary of Transportation "shall not approve any program or project that should require the use of public parkland unless 1) there is no feasible and prudent alternative to the use of such land and 2) such program

includes all possible planning to minimize harm to such park." The Court said the language was not discretionary but "a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." at 411.

The Merchant Marine Act is cast in exactly the same mandatory form as far as the section critical to the present proceeding, those covering award and payment of subsidy and withdrawal of same when certain violations are proved.

Section 810 states "no payment or subsidy of any kind shall be paid directly or indirectly out of the funds of the United States to any contractor who shall violate this section." "With a mandatory type statute the Secretary must take certain action if requirements are met, the discretion of the Secretary is limited to deciding whether the requirements have been met." *United States* v. *Walker*, 409 F.2d 47, 480 (9th Cir. 1969). In this present case the Second Circuit Court of Appeals in *Safir* v. *Gibson*, 432 F.2d 137-143 (1970) *supra* stated that the discretion of the Secretary in determining the violation was limited only to proof that the AGAFBO Lines were receiving operating differential subsidy at the time and that the carrier adversely affected was a "citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports." The Maritime Subsidy Board determined that this requirement was met.

In the present case as in Overton Park, the terms "No subsidy shall be paid." is absolute—at least for the period of violation. This language (to paraphrase Overton) is a plain and explicit bar to the use of Federal funds for

all subsidy payments for at least the period of violation. At this point, it should be noted that the *Solicitor General* in his brief in opposition to this plaintiff's earlier *Petition for cert. 400 U.S. 850* denied stated "*the penalty created by Section 810 is inflexible as it bars all subsidy payments for at least the period of violation.*" (App. D p. 9).

Plaintiff agrees with this description and definition but would substitute "sanction" for "penalty".[3] In the light of Overton Park "action committed to agency discretion is only applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply."

In the case of Section 810 the clarity of the statutory language precludes any rationalization for avoiding the hard command of the statute. The position taken by the Maritime Subsidy Board in its Final Decision of April 16, 1973 (13 SRR 809) was based on the premise that the general policy of the Merchant Marine Act to promote the welfare of the Merchant Marine conflicted with Section 810 and required reconciliation by allowing the Secretary of Commerce to engage in a wide range balancing of competing interests.

But as is stated in Overton Park, no such wide range endeavor was intended by the statute. *If Congress intended general policy factors for the promotion of American flag lines against foreign competition to be on equal footing with the protection of an unsubsidized American business citizens acting in concert there would have been no need for Section 810 at all.* This protection

---

[3] Plaintiff respectfully submits that the Solicitor General's designation of this command as "penalty" was in the context of the definition of the punitive effect being a desirable by product by Judge Friendly in *Safir* v. *Gibson*, 1969 *supra*.

was paramount. As Judge Friendly fully recognized in the 1969 opinion "The primary concern manifested by the Congress in the legislative history of 46 U.S.C. 1227 was with the added burden which subsidies imposed on the competitive position of the victim."

When these "public monies are used to assist some citizens to hurt others in a manner inimical to the interests of the United States," Judge Friendly wrote that relief beyond a treble, damage remedy to private citizens was available. The Supreme Court in Overton Park has carried the mandatory sanction for the evil at which Section 810 was aimed beyond administrative discretion. Plainly there is law to apply and thus the exemtion for action committed to agency discretion is inapplicable.

II.

Recovery of public subsidy money is not a "forfeiture" or "penalty" of moneys "earned".

Recovery of subsidy illegally paid is not a penalty, since Section 810 is not a penal statute. It is a return to the United States Treasury of moneys falsely claimed by the violating carriers when they, without the consent of the government contracting authority (the Maritime Administration), abrogated their subsidy contracts and the statutory provisions in the Merchant Marine Act of 1936 establishing these contracts. The civil penal statute for such false claims may later be invoked under the double damage provision of Title 31 U.S.C. § 231, § 232, but this is not presently at issue.

At issue is the actual recovery of approximately Two Hundred Twenty Seven Million Dollars ($227,000,000.00) of payments, not as forfeits, not as fines, not as penalties, but as funds falsely claimed and improperly paid out.

The Maritime Administration, through its staff counsel, Michael J. McMorrow, in Docket S243 (Proposed Finding of Fact), states: ". . . in the present case and notwithstanding the inclusion of the requirements of § 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission, but proceeded to effect rate reductions and to wage battle before the F.M.C. Once the Board was involved, and only through the behest of Mr. Safir, the respondents firmly deny to this date that rate actions are subject to the section. These distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of the day they first began, without any overture to the Maritime Administration, the unlawful behaviour".

The Second Circuit did not say "some" of such payments, or "part" of such payments. An attempt at administrative revision of this wording was thwarted by this plaintiff-appellant when the first edition of the MSB decision in S243 of April 16, 1973 was published. Contrast page 58 in Appendix E-2 with page 58 as originally printed prior to plaintiff's protest (Plaintiff's Appendix E-1).

This sly pattern of legal revisionism was not reserved for the defendant-appellee—it was used in the brief of the so-called "trade defendant intervenors" in this action.

On page 20 of their memorandum brief, they quote the 2nd Circuit opinion as follows: "The legislative history of (§ 810) demonstrates that termination of subsidies was not considered a desirable by-product. *Safir* v. *Gibson*, 417 F.2d at 97".

The quote as the opinion properly reads, is as follows: "The legislative history demonstrates that termination of

subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable by-product."

The importance of this falsification of the record cannot be overlooked, because the crux of the "mitigation" argument is the "penal" characterization of the mandate of § 810. The United States is not an uninjured third party in this case, but, instead, is a major injured party. As the 2nd Circuit stated in *Safir* v. *Gibson, supra,* 1969 in footnote No. 8, "Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which § 810 was aimed, namely that *Public Monies* have been used to assist some citizens to hurt others in a manner *inimicable to the interest of the United States.*"

Nor is the sum sought to be exacted grossly disproportionate to the actual damage because the sum *is less than* the damages to the United States when a percentage of the recovery must be paid to the party at whose behest the fraud was uncovered. (*United States ex rel. Marcus* v. *Hess,* 317 U.S. 537-561; *United States* v. *Griswold,* 24 F. 366) (Cf. Title 31 U.S.C. § 231-§ 232).

This misquotation of the 2nd Circuit opinion is, therefore so significant as to spotlight the inapplicability of the mitigation concept altogether.

Seen in this light, not only is the inducement of certain Department of Defense officials in the illegal action irrelevant, but penalty formulae concocted out of misleading euphemisms such as "mitigated recoveries of subsidy" only compound the capriciousness of defendant Dent's circumventions.

A revealing aspect of his dilemma can be found in his frank answer to the subsidized violators in their United States District Court action against him CADC #74-1788 (App. F). When defending against *them* he is in complete agreement with this appellant's position as Appendix G attests. His answer to the Plaintiff's in that action (later consolidated with this one) clearly states:

> ". . . by characterizing defendants' orders requiring a recovery of public subsidy money as working a forfeiture or 'penalty' of monies 'earned', plaintiffs materially misstate the true facts. Although plaintiffs use such terms throughout their complaint this allegation will not be repeated."

The Secretary apparently found his own "mitigated recovery of subsidies paid" a better if misleading euphemism for an illegal penalty assessment. *Nonetheless one cannot mitigate recovery of unearned government funds illegally disbursed without leaving in the pockets of the violators monies belonging to the public fisc.*

His peremptory command "this allegation will not be repeated" apparently was to apply only to the Docket 74-1788 and not the action brought by this plaintiff in Docket 74-1474 where the record is replete with his and intervenors use of the word "penalty" and forfeiture for months after this January 3, 1975 order to the troops. Perhaps this appellant received this exhibit by mistake.

III.

The Secretary of Commerce and his constituent agency MSB exceeded their authority by inappropriate exercise of their rule making powers.

The final MSB order on "recoveries" of October 10, 1973 states as follows (Appendix H):

In the Opinion and Order we made the legal conclusion that under Section 810 all ODS paid during past violations may be recovered and that we have discretion to mitigate such recoveries. The recoveries for all trade respondents were mitigated to the following percentage formula of ODS:

> "After carefully considering all of the facts and policy objectives of the Act applicable to trade respondents' violations, we are persuaded to further limit their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade route whereon the condemned rate reductions were in effect." (p. 61)

This formula was restated for Lykes as follows:

> "Hence, the amount to be recovered from Lykes is the percentage of ODS received from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received therefrom during the period of violation." (p. 62)

The underlying principle of this formula is that recoveries would be mitigated to a certain level—a ratio of ODS involving all military cargo revenue received on the route during the violation.

The Secretary of Commerce in his order of September 9, 1974 then proceeded to mitigate "subsidy subject to recovery" by are unexplained and arbitrary 50% based on "the effect of U.S. government action."

Neither of these actions were in accordance with procedure required by law.

On September 5, 1975, this Court decided in *States Marine Int'l* v. *Peterson*, as yet unreported see App. I

that rule making which change existing interpretations of subsidy reduction and subsidy recovery are proper if consistent and reasonable only if they are applied prospectively.

The Court stated (p. 1713) "a hearing received in the context of formal rule making constituted a 'proper hearing' and the proposed rule may be applied *prospectively* with respect to both existing and new contracts."

The Court noted with approval (p. 1712):

> "The Board order provided further that nothing stated therein 'should be construed as rendering illegal any prior acts, policies, rulings or interpretations of the Secretary,' the Board, or the Maritime Administration (and predecessor bodies) under the ODS and CDS programs."

Clearly, the application of a new refund rule established in 1973 and modified in 1974 for a violation of sec. 810 that occurred in 1965-1966 is a *retrospective* formulation tailored to achieve in *hindsight* what could not be done under the *prospective* interpretation by the Maritime Administration in 1965 of the obligation of the government when sec. 810 is found to have been violated.

In 1965 under the heading of Docket A-17 the Maritime Administration undertook in formal proceeding an interpretation of the statute. (See American President Lines Ltd., Japan/Saigon Freight Conference App. J). This was decided in July of that year—ironically during the height of the predatory activity against the victim in this case.

A reading of this decision which was not appealed lays to rest the protestations of the Secretary and the Board as to the "technical nature" of the non-trade lines

violation, and lays to rest the argument of the Board for mitigation that the violators were not fully aware of the extent of financial consequences for past violations.

It states in clear and unequivocal terms "The Maritime Administration is obliged to stop subsidy payments to violators of this section" (p. 14, App. J).

This language, furthermore is reflected in each operating differential subsidy agreement thus making the grant of subsidy conditional upon the operator not continuing to be a party to or conforming to any agreement which is unjustly discriminatory or unfair to any other American Citizen (Article II-18(b)) ODS contact standard Part II . . . App. J, p. 16.

This then was the 810 subsidy rule in 1965—a grant of subsidy conditional on lawful behavior, a cessation of payments while a violation continued. There were no formulae based on percentages of military cargoes carried on specific voyages in specific months in two calendar years. There was no mitigation rule for the involvement of federal officials in the illegal action. Loss of subsidy was loss of payments under formulae established by Section 502 and Section 603(b) of the MMA between 1936 and 1965.[3]

---

[3] This court in *SMI* v. *Peterson* in discussion of CDS correctly if indirectly implied that between 1952 and 1970 only ODS contractors were recipients of CDS in foreign commerce. It was not until 1970 that Congress made it clear that CDS was to include shipyards and others as direct recipients of subsidy funds matching payments to ODS American flag liner operators under the essential trade route concept of Titles I and II. Hence during the period of violation payments of CDS were improperly claimed and paid out of the Treasury of the United States while the Maritime Administration was unaware that the violation was taking place.

The doctrine in *States Marine International* v. *Peterson* limiting administrative rule making discretion to prospective undertakings represents the bar to the retroactive refund rule in S243.

The final pages of this 10 year litigation are written in the considered judgment of this Court in this decision. Appellant pro se regrets only that he did not request the lower Court to take official notice of Judge Jamison's opinion—before it denied his motion for summary judgment. This Court might not have been burdened with this appeal.

Wherefore, plaintiff-appellant prays this Honorable Court to vacate and set aside the order of the District Court herein dismissing the complaint and to remand the proceeding with directions to reinstate the complaint and grant the plaintiff's motion for summary judgment.

Respectfully submitted,

Marshall P. Safir, Pro Se
Plaintiff-Appellant
41 Flatbush Avenue
Brooklyn, N. Y. 11217

November 26, 1975

Appendix C—Reply Brief for Plaintiff-Appellant Dated March 26, 1976

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Docket No. 75-2050

Civil Action No. 74-1474 Consolidated with 74-1788 and 75-0077 on Appeal from the United States District Court for the District of Columbia.

MARSHALL P. SAFIR,
Plaintiff-Appellant,

—v.—

ELLIOT RICHARDSON, Secretary of Commerce, et al.,
Defendants-Appellees,

AMERICAN EXPORT LINES, INC., et al., and AMERICAN PRESIDENT LINES, et al.,
Intervening-Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

MARSHALL P. SAFIR, Pro Se
Plaintiff-Appellant
41 Flatbush Avenue
Brooklyn, N. Y. 11217

March 26, 1976

TABLE OF CONTENTS

TABLE OF CASES

of his aggrievement. It is also proof that he is just as much a victim of the false claims as the government with which if he is successful here, as the real party in interest he will seek to share in the recovery.

The subsidy claims paid to the defendant intervenors were used to finance their predatory activity against Sapphire SS Lines, many of whose liabilities were personally guaranteed by this appellant.

This appellant, in personally repaying creditors of the line from 1968 until this present day in March, 1976, through either liquidation of assets—as was the case in the sale of his family business to Novo Corp. (see Affidavit)—or the cash repayment out of personal earnings in the ensuing years, or the assignment of his right to the proceeds of the Anti-trust suit *Sapphire SSL* v. *AGAFBO* (app. pp. A292, A299, A300), has been grievously harmed, and the harm continues as these repayment obligations continue.

He continues to be harmed as this drain of his financial resources makes his reentry into competition with his former competitors impossible from his weakened financial base.

Appellant submits that this is the aggrievement-in-fact which confers standing under modern legal doctrine. Since *Scanwell Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), this Circuit is generally recognized as having adopted the standard most hospitable to petitioners for review, namely that they have standing if aggrieved-in-fact. Davis, *Administrative Law Treatise* (1970 Supp.) 715-16, 727, 793; cf. opinion of Justices Brennan and White, *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 172 (1970), suggesting that aggrievement suffice even if it is only *damnum absque injuria*.

This injury-in-fact is proved by the Appendixed Affidavit with its exhibits, and, thus, all the conclusions of the appellees that Appellant Safir has no standing must fall.

Competitors have always had standing if the applicable statute revealed a purpose to protect their interests. A test is "whether the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute". *Data Processing, supra* 153. Appellant has no difficulty in meeting this test, since 46 U.S.C. § 1227 protects American flag competitors from concerted acts of subsidized carriers found to be unjustly discriminatory or unfair. Appellant meets this test in the infirmity of Secretary Dent's decision regarding the Second Circuit's requirement to protect the competitive interest of the victim, or to recover the full subsidy falsely claimed so that the Appellant upon amendment of his complaint under 31 U.S.C. 232 could participate in the recovery. The statute of limitations is no bar here. *Templeton* v. *United States*, 199 F. Supp. 179-186 is squarely on point. F.R.C.P., Rule 15(c) 28 U.S.C.A.

Lastly, though it is his private interest that confers standing, the Appellant's true function here is to vindicate the public interest as well. The aggrievement arises out of the employment of subsidies defined by the statute to protect unsubsidized American citizens from illegal practices in concert by predatory competitors rendered possible only by the receipt of their subsidies. Curing Appellant's aggrievement vindicates the true intention of the statute. Equally significant, as *Scanwell* observes 424 F.2d 866, if Appellant is not allowed to pursue his remedy in this proceeding, no other person will defend the public interest in the recovery of government funds when the

purposes for their disbursement, as laid down by the Congress, have been violated. The actions taken in this case by the Secretary show that the Agency has little interest in doing so, and its improper reading of its obligation under the statute will go unreviewed and uncorrected. "Certainly, he who is likely to be financially injured . . . may be a reliable private Attorney General to litigate the issues of the public interest in the present case." *Data Processing*, 397 U.S. 150, 154. Certainly, he who has been already injured will meet the test as strongly.

> "The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors . . . In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. Recovery of such payments imposes an added cost on the violators, and, thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him." *Safir* v. *Gibson*, *supra* 1969.

The Second Circuit in this decision made special reference to an affidavit by this appellant that because he desired to return to the shipping business as soon as possible he was a potential competitor.

The Court also stated that the government defendants were wrong at that time in arguing that the United States District Court for the Eastern District was correct in finding that the provision of a private treble damage remedy (as was used in separate actions by J. Reed

Smith, trustee, in bankruptcy for Sapphire Steamship Lines and Arnold Weissberger, an officer and stockholder of Sapphire Steamship Lines prior to its demise) created a strong implication that the statute authorized no further relief to a citizen. The Court in disagreeing stated, "The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit *against the violators, his recovery does not correct the evil* at *which Section 810 aimed, namely, that public monies have been used to assist some citizens to hurt others in a manner inimicable to the interest of the United States.*" The Court made no distinction between a potential competitor like plaintiff Safir or a former victim who has washed his hands of the business like Mr. Weissberger. The Court felt that the interruption of operations did not alter either victim's interest to use the protection of Section 810 to see to it that the Secretary of Commerce recovers the subsidies improperly paid in the past. The competitive interest of plaintiff Safir as a potential competitor upon re-entry into the shipping industry is an interest which is legally protected. (*Safir* v. *Gibson, et al.*, 417 F.2d 972, et seq., 1969).

In short the Court recognized all three plaintiffs as parties in interest and affirmed their standing to pursue jointly or severally the recovery of these funds by the Maritime Administration.

Only this appellant elected to pursue the "further relief consistent with the statutory scheme". Indeed, his implied standing under the False Claims Act lurked behind every word of the decision in *Safir* v. *Gibson*, *supra*, 1969. *Nothing* in the decision was *inconsistent* with 31 U.S.C. 231, 232.

Appellant's reentry into competition will be delayed only until he can invest his share of the recovery back into the American Merchant Marine. Plaintiff is prepared to reinvest these funds in order that such recovery might not "fatally interfere with the general policy of the act to foster the development of the American Merchant Marine". Appellant does not intend to "take the money and run".

Contrary to all statements made by the appellees *the Maritime Subsidy Board admitted that "the Second Circuit did not make any definite finding regarding any discretion in connection with recovery for past violations.* At most the Court found that while there may be some discretion in the recovery of past subsidies as distinguished from payments to current violators the discretion is not unlimited". This is a direct quotation from the decision, see page 181 of the Supp. Appendix. Seven years have passed since the Second Circuit decision in *Safir* v. *Gibson, supra,* 1969. It is unlikely today in light of *Citizens to Preserve Overton Park* v. *Volpe, supra,* 1971, whether the Second Circuit would still subscribe to this double negatived equivocation.

In view of the Secretary's finding that all eight carriers had violated the statute a proper order for the recovery of all the subsidies during the eleven month period would have permitted this appellant to amend his complaint under his original action in the United States District Court for the Eastern District of New York (Docket 68 C 643). See *United States* v. *Templeton,* D.C. Tenn. 1961, 199 F. Supp. 179 and *United States* v. *Tieger,* D.C. N.J. 1954, 138 F. Supp. 709 *aff'd* 234 F.2d 589, *cert. denied,* 77 S. Ct. 262, 352 U.S. 941 and 1 L.Ed. 2d 237 and move for summary judgment under the doctrine of

Collateral Estoppel for double damages for the United States and entitlement of 25% of said recovery for himself. (*Sell* v. *United States,* 1964 C.A. Colo. 336 F.2d 467). This would have been accomplished under a waiver of notice of pendency by the Attorney General (See *United States* v. *Pittman,* C.C.A. Ala. 1945, 151 F.2d 851, *cert. denied,* 66 S.Ct. 1022).

If, as government counsel sets forth on page 21 of his brief the Supreme Court decision in *Warth* v. *Selden* requires that the challenged practice harm him, this appellant unequivocally states that the Secretary's illegal retrospective refund rule (*States Marine Line* v. *Peterson, supra*) by its circumvention of his ministerial duty to recovery fraudulent disbursements, or to request the Attorney General to recover these funds, has harmed him in the pursuit of his primary objective—a monetary stake in the recovery through his unique standing under 31 U.S.C. 231, 232, 235, for the purpose of reinvesting this stake in the United States Merchant Marine.

Further the Secretary's unsupported charge that federal officials in the Department of Defense induced the illegal action against Sapphire was an attempt to cloak the violators with immunity under a crudely contrived estoppel against a government initiated action under 31 U.S.C. 231, 232, 235.

By coupling this charge with an illegal recovery formula he could accomplish his objective—further delay of the inevitable result of this case.

The formula would divert the victim-appellant into an APA review which would bring the Attorney General to the Secretary's defense while it would deter the Justice Department from its duty to prosecute the violators

under the False Claims Act under the justification of the spurious estoppel.

His parry has temporarily succeeded in spite of its transparency. Eighteen months have passed since his order.

Neither the Adm. Law Judge nor Maritime Subsidy Board found any credibility in this argument but even assuming *arguendo* that they did and that the Secretary was correct as regards these defense officials, the agency upon whom the fraud was perpetrated was not the Department of Defense but the Maritime Administration of the Department of Commerce, his own agency.

The Attorney General has apparently resolved his dilemma only now, and tacitly by delaying his answer in this appeal beyond the 60 days required by law, he waived notice of pendency, implementing this appellant's right to proceed for the United States in his stead.

But without the intervention and guidance of this Court further action hereby would be subject *inter alia* to relitigation of the estoppel aspects of the obfuscatory paragraph of the Secretary's order.

The fact that government officials induced lower rates is usually considered exemplary. The fact that carriers reduce rates by individual action under economic pressure is not illegal. But, in this case the action to reduce rates to a non-compensatory level was a violation of Section 810 because it was done by the carriers *in concert* in willful abrogation of their subsidy contracts.

Furthermore both the Trade Respondents action in the District Court, Docket No. 1788 and the Non-trade action in the District Court, Docket No. 75-0077 attempt to overturn the basic thrust of the Secretary's order. *When he denied their Petitions for Review he held that the*

Maritime Subsidy Board's decision was correct, that all eight carriers both trade and non-trade had violated Section 810 of the Merchant Marine Act, and the decision was justified in fact and was hence res judicata.

Appellees seem preoccupied with the erroneous conclusion that rate activity was the *only* basis for finding of violation and that the Non-trade carriers involvement was only technical in nature. A reading of pages 174 to 180 of the Supplemental Appendix lays this point to rest. The Non-trade lines continued as parties and conformed to the AGAFBO agreement and actually engaged in determining policy on discriminatory credit agreements with shippers. These were also willful acts and as stated in the MSB decision the reason these acts were not brought forward in greater detail was that the Administrative Law Judge excluded them from the record (Appendix page 199).

The cardinal point is the conclusive finding of violation itself. The Trade and Non-trade intervenors all have informed this Court of the pending residual issues which they have prevailed upon the District Court to keep alive if they are unsuccessful here. Appellant submits that review of issues which are *res judicata* is not contemplated by the APA 5 U.S.C. 701(2) *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 416. *States Marine Lines* v. *Peterson, supra* (Appendix page A61 paras. 12 and 13 and including footnote 28) also *Bowman Transportation Inc.* v. *Arkansas Best Freight System Inc.*, — U.S. at —. Further relitigation must be denied to finally force repose. *The substantial evidence test was overwhelmingly met in this case and the District Court should be so instructed.*

Department of Justice argues that appellant failed to exhaust administrative remedies and therefore waived his

right to review of the Secretary's decision when he did not apprise the Secretary of his opposition to that part of the MSB decision which dealt with the arbitrary retrospective formula for "recovery of subsidies" in S 243 by filing a petition for review under the Department of Commerce administrative rules.

Appellant had been following the pattern of review action in Docket No. S 244 at that time which formed the basis of this Court's decision in *States Marine Lines* v. *Peterson*, 518 F.2d (C.A. D.C. 1975), *cert. denied*, — U.S.L.W. — (March 1976) in the District Court where the Secretary had filed similar objections against the prematurity of this suit against him prior to filing a petition for review.

Judge Aubrey Robinson rejected the Secretary's position citing *United States* v. *Consolidated Mines & Smelting*, 455 F.2d at 436 (9th Circuit) which held that the doctrine of exhaustion of administrative remedies does not require the completion of appellate or review proceeding within the agency.

The Secretary accepted Judge Robinson's ruling in *States Marine Lines* v. *Peterson* and did not appeal. Appellant submits this case at bar requires the same result. Since the right to petition for the Secretary's review is permissive and not mandatory. The Secretary was fully aware of appellant's views, both appellant's satisfaction with the resolution of the violation issue and appellant's dissatisfaction in the MSB decision as it related to mitigated "recoveries of subsidies." As a defendant he was personally served by the U.S. Marshal with the premature complaint in D.C. D.C. Docket No. 2156-73.

As a layman of modest means, through the last six years of these proceedings appellant could not have sustained outside legal expenses of this magnitude for the

duration. Appellant recognized that under the law in a False Claims Act suit he could not represent the United States as attorney but must engage licensed counsel (*United States* v. *Onan*, CA Minn. 1951, 190 F.2d 1, *cert. denied*, 72 S. Ct. 112, 342 U.S. 869).

Until that time he could however act pro se in an APA review to set aside that part of the order as it applied to mitigation of statutory damages. Accordingly, this proceeding was commenced to reverse the subsidy recovery rule and then apply the collateral estoppel effect of such reversal to an amended complaint under 31 U.S.C. 231, 232-235, either here or the Eastern District of New York upon the remand to the District Court.* If he is successful here he would, to everyone's relief consider engagement of licensed counsel an acceptable risk and a justifiable expense.

CONCLUSION

Wherefore, plaintiff-appellant prays this Honorable Court to vacate the order of the District Court herein dismissing the complaint and to remand the proceeding with direction to reinstate the complaint and amend same, dismiss District Court Dockets No. 1788 and 75-0077 and grant plaintiff's motion for summary judgment.

Respectfully submitted,

Marshall P. Safir, Pro Se
Plaintiff-Appellant
41 Flatbush Avenue
Brooklyn, N. Y. 11217

---

* Also the basic six year Statute of Limitations is no bar until June 1977 to an amended complaint in Docket No. 74-1474 or separate action under 31 U.S.C. § 232 in the D.C. Circuit for those false claims vouchered in 1971 for the 11 month period of violation (see appendix affidavit of Safir June 7, 1971 A-145-A-148, as it relates to Judge Dooling's order releasing injunction (A-248)).

Appendix C—Reply Brief for Plaintiff-Appellant Dated March 26, 1976

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2050

MARSHALL P. SAFIR,
Plaintiff-Appellant,

—v.—

ELLIOTT RICHARDSON, SECRETARY OF COMMERCE, ET AL.,
Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1976, I served the foregoing brief upon appellees and all counsel of record by causing copies to be mailed, postage prepaid, to:

J. FRANKLIN FORT, ESQ.
KOMINERS, FORT, SCHLEFER & BOYER
1776 F Street, N.W.
Washington, D.C. 20006

JAMES N. JACOBI, ESQ.
KURRUS and JACOBI
2000 K Street, N.W.
Washington, D.C. 20006

ELMER C. MADDY, ESQ.
KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, New York 10005

VERNE W. VANCE, JR., ESQ.
10 Post Office Square
Boston, Mass. 02109

ROBERT T. BASSESCHES, ESQ.
734 15th Street, N.W.
Washington, D.C. 20006

DANIEL H. MARGOLIS, ESQ.
WARREN L. LEWIS, ESQ.
11 Dupont Circle, N.W.
Washington, D.C. 20036

REX E. LEE
Assistant Attorney General

EARL J. SILBERT
United States Attorney

WILLIAM KANTER
RICHARD A. OLDERMAN
Attorneys,
Deparment of Justice,
Civil Division—Appellate Sect.,
Washington, D.C. 20530

MARSHALL P. SAFIR
Pro Se

Appendix D—Order of U.S. District Court, District of Columbia, Dated October 21, 1975

Civil Action No. 74-1474

MARSHALL P. SAFIR,
Plaintiff,

—v.—

FREDERICK DENT, individually and as Secretary of Commerce,
Defendant,

AMERICAN PRESIDENT LINES, LTD., et al.,
Intervening Defendants.

Order

Plaintiff Marshall P. Safir, having moved for summary judgment, defendant Frederick Dent, and intervening defendants' Trade Lines and Non-Trade Lines having replied to plaintiff's motion and cross-moved for summary judgment, the Court having considered the motions, memoranda of points and authorities of all parties, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied, that defendant's and intervening defendants' motions for summary judgment are granted and the complaint herein is dismissed with prejudice this 21st day of October, 1975.

....

Appendix E—Order of Secretary of Commerce Dated September 9, 1974

THE SECRETARY OF COMMERCE

Washington, D.C. 20230

ORDER

In the Matter of:

Subsidy Board Docket No. S-243 Investigation of Alleged Violations of Section 810 of the Merchant Marine Act, 1936, as amended.

The petitions of American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Bloomfield Steamship Co. and United States Lines for review of the Maritime Subsidy Board's decisions of April 9, 1973 and October 10, 1973 are hereby granted, solely with respect to the mitigating circumstances and appropriate sanctions to be imposed on the trade respondents. In all other respects, the petitions are denied. The petition for review of American President Lines, Ltd., Farrell Lines, Inc., Prudential-Grace Lines, Inc., and Prudential Steamship Company, Inc. is denied.

The record before me fully presents the contentions of the parties without need for further submissions or delay.

The record indicates that the United States Government actively induced the rate reductions here in issue, and received substantial financial benefit from such reductions. The record further suppports the conclusion that, but for the active inducement of federal officials, rates found by the Federal Maritime Commission previously not to have been unreasonably high would not have been reduced to noncompensating levels by respondents.

Accordingly, having considered the total circumstances surrounding the rate reductions in question, it is my conclusion that recovery from each of the trade respondents in the October 10, 1973 Final Order on Recoveries shall be modified by reducing the total amount of subsidy subject to recovery to $1,126,522.26 to be apportioned in accordance with the table attached hereto.

The adjustment here ordered is made to reflect the effect of the United States Government action, notwithstanding that the trade respondents shared in a greater or lesser individual degree in the improper conduct that has been determined to have occurred as charged in the petition to the Board.

So Ordered

....

Secretary of Commerce

Date: September 9, 1974

TABLE

	COMPANIES				
	AEL	Bloomfield	Lykes	Mormac	United States Lines
Total affected operating differential Subsidy paid during relevant period	$203,739.84	$750,551.12	$2,725,587.69	$ 968,091	$11,082,875
Percentage of Military Cargo to Freight Revenues	*23.77%	24.7%	27.99%	53.27%	17.5%
Portion of Operating Differential Subsidy related to Military Cargo	$ 48,428.83	$185,386.13	$ 762,891.99	$515,702.075	$ 1,949,168.53
Reduction of 50% due to Inducement of Government Officials	$ 24,214.43	$ 92,693.07	$ 381,446	$257,702.075	$ 974,584.27
Reduction due to Special Mitigating Circumstances	$ 18,160.82	$ 46,346.54	—	$193,276.76	$ 487,292.14
Amount Subject to Recovery	$ 18,160.82	$ 46,346.54	$ 381,446	$193,276.76	$ 487,292.14

* The Maritime Subsidy Board has advised that the percentage expressing the relationship between total revenues and military cargos should be changed to this figure.

Appendix F—Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 643

MARSHALL P. SAFIR, et al.,

Plaintiffs,

—against—

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al.,

Defendants.

MEMORANDUM AND ORDER

The situation of the parties and the disposition of events have not so changed as to require injunctive relief different from that earlier granted. Judge Robinson's decision of February 7, 1974, related to the basis on which operating differential subsidies may properly be granted, and not to the basis on which refunds could be exacted. The refund rule appears to measure out forfeitures equal to the part of each cost subsidy allocable to the cargo on which the offending rates were made.

It is, accordingly,

ORDERED that the motion made by the Affidavit and Motion for Modification of April 5, 1974, is in all respects denied.

Brooklyn, New York
April 30, 1974.

....

U. S. D. J.

APPENDIX G

* * * * *

objectives are extended to recovery for a past violation and that Congress sought by such recovery to impose "an added cost on the violators and thus . . . partially make up to the victim for the burden which the earlier payments indirectly imposed on him." [58]

It follows that recovery for past violations requires a different standard for recovery of "payment or subsidy," as contemplated in Section 810, than non-payment for existing violations.[59] The instant violation ceased long before it was established to be a violation and requiring return of all subsidies and payments made by the Government to the violators * * *

* * * * *

---

[58] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969). Trade respondents argue that under the Second Circuit decision recovery for past violations of Section 810 is based on common law principles and not statute. However, the Second Circuit merely stated the statute did not expressly authorize such recoveries. It found by necessary implication from common law principles that "§ 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past." *Id.* at 978. Thus, recoveries considered in this proceeding are grounded on statutory authority, as interpreted by the Court.

[59] In *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969), the Second Circuit found: a) ". . . the duty of the administrator may be less absolute [for recovery of subsidies improperly paid in the past to violators] than is the obligation to cease payments to current violators." *Id.* at 977, b) "So far as concerns payments, as distinguished from recoveries, the statute is mandatory where applicable . . . and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American Merchant Marine." *Ibid.* c) "While the Maritime Administrator may have same discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited." *Id.* at 978. *Accord, Safir* v. *Gibson*, 432 F.2d 137, 140 (2d Cir.), *cert. denied*, 400 U.S. 972 (1970).

APPENDIX H

objectives are extended to recovery for a past violation and that Congress sought by such recovery to impose "an added cost on the violators and thus . . . partially make up to the victim for the burden which the earlier payments indirectly imposed on him." [58]

It follows that recovery for past violations requires a different standard for recovery of "payment or subsidy," as contemplated in Section 810, than non-payment for existing violations.[59] The instant violation ceased long before it was established to be a violation and requiring return of all subsidies and payments made by the Government to the violators * * *

* * * * *

---

[58] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969). Trade respondents argue that under the Second Circuit decision recovery for past violations of Section 810 is based on common law principles and not statute. However, the Second Circuit merely stated the statute did not expressly authorize such recoveries. It found by necessary implication from common law principles that "§ 810 was designed to promote the competitive interest of a victim by authorizing the recovery of all or part of subsidies improperly paid in the past." Id. at 978. Thus, recoveries considered in this proceeding are grounded on statutory authority, as interpreted by the Court.

[59] In *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969), the Second Circuit found: a) ". . . the duty of the administrator may be less absolute [for recovery of subsidies improperly paid in the past to violators] than is the obligation to cease payments to current violators." *Id.* at 977, b) "So far as concerns payments, as distinguished from recoveries, the statute is mandatory where applicable . . . and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American Merchant Marine." *Ibid.* c) "While the Maritime Administrator may have same discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited." *Id.* at 978. *Accord, Safir* v. *Gibson*, 432 F.2d 137, 140 (2d Cir.), *cert. denied*, 400 U.S. 972 (1970).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 74-1788

AMERICAN EXPORT LINES, INC.
26 Broadway
New York, New York 10004
(212) 482-8000

LYKES BROS. STEAMSHIP CO., INC.
300 Poydras Street
New Orleans, Louisiana 70130
(504) 523-6611

MOORE-MCCORMACK LINES, INCORPORATED
Two Broadway
New York, New York 10004
(212) 363-6600

—and—

UNITED STATES LINES, INC.
One Broadway
New York, New York 10004
(212) 344-5800

Plaintiffs,

—v.—

FREDERICK B. DENT, individually, and as Secretary of Commerce, Washington, D.C. 20230

ROBERT J. BLACKWELL, individually, and as Assistant Secretary of Commerce for Maritime Affairs, Maritime Administrator, and Chairman, Maritime Subsidy Board United States Department of Commerce, Washington, D.C. 20230;

JAMES S. DAWSON, JR., individually, and as Alternate Member, Maritime Subsidy Board, United States Department of Commerce, Washington, D.C. 20230

A. READING VAN DOREN, JR., individually, and as Member, Maritime Subsidy Board, United States Department of Commerce, Washington, D.C. 20230

HOWARD F. CASEY, individually, and as Member, Maritime Subsidy Board, United States Department of Commerce, Washington, D.C. 20230

Defendants.

Complaint for Review of Agency Action and for Declaratory Judgment and Injunctive Relief

Jurisdiction

1. This is a civil action for a judgment declaring invalid, and for a judgment declaring invalid, and for a permanent injunction against the enforcement of, a final order of the Secretary of Commerce dated September 9, 1974 (Attachment A), an opinion and order of the Maritime Subsidy Board (the "Board") served April 16, 1973 (13 SRR 809), and a "Final Order on Recoveries" served October 15, 1973 (14 SRR 77) by the Maritime Subsidy Board holding that Plaintiff steamship companies, among others, had violated Section 810 of the Merchant Marine Act, 1936, in reducing transportation rates for military cargo carried for the United States between United States Atlantic and Gulf ports and northern Europe between March 29, 1965 and February 28, 1966, in order to match similar rates charged by Sapphire Steamship Lines, Inc. ("Sapphire"), a new carrier entering the trade. The Secretary's final Order equired these Plaintiffs to forfeit to the United States under Section 810 the aggregate amount of $1,080,176 in subsidies previously earned under their operating-differential subsidy contracts as the penalty for participating in that alleged violation.

This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337 & 1651; 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201-2202. The matters in controversy exceed the sum or value of $10,000 as to each Plaintiff exclusive of interest and costs. Venue is proper pursuant to 28 U.S.C. § 1391.

Plaintiffs

2. Plaintiff, American Export Lines, Inc., is a corporation organized and existing under the laws of the State of New York and having its principal offices in New York City; Lykes Bros. Steamship Co., Inc., is a corporation organized and existing under the laws of the State of Louisiana and with principal offices in New Orleans; Moore-McCormack Lines, Incorporated, is a corporation organized and existing under the laws of the State of Delaware with principal offices in New York City; and United States Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware with principal offices in New York City.

Defendants

3. Defendant, Frederick B. Dent ("Dent") is the Secretary of Commerce and, as such, is charged with responsibility for the performance of various functions pursuant to the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101, *et seq.* Under Reorganization Plan No. 7 of 1961 (75 Stat. 840), certain of his functions, including the administration of Section 810 of the 1936 Act, may be delegated to the Maritime Administration and the Maritime Subsidy Board which are constituent agencies within the United States Department of Commerce. The Maritime Administration was created by Reorganization Plan No. 21 of 1950 (64 Stat. 1273).

4. Defendant Maritime Subsidy Board was created by the Secretary of Commerce as a subagency within the Maritime Administration by Departmental Order No. 117 (Revised) effective August 12, 1961, by which certain functions of the Secretary of Commerce were delegated to the Maritime Administration and the Maritime Subsidy Board.

5. Defendant Robert J. Blackwell ("Blackwell") is the Assistant Secretary of Commerce for Maritime Affairs and is also the Chairman and a Member of the Board.

6. Defendant James S. Dawson ("Dawson"), is the Secretary of the Maritime Administration and the Board, is the Alternate Member of the Board. The opinion and order of the Board served April 16, 1973 (Pike & Fischer, 13 Shipping Regulation Reports, p. 809), and the Final Order on Recoveries of the Board served October 15, 1973 (14 SRR 77), were issued by Defendants Blackwell, Dawson, and former Board Member, H. Clayton Cook, Jr.

7. Defendant Howard F. Casey was as the time of the actions mentioned a member of the Board but did not participate in the decisions.

8. Defendant A. Reading Van Doren is the current member of the Maritime Subsidy Board succeeding H. Clayton Cook, Jr.

9. All individual defendants above-named are officially resident in the District of Columbia.

Statutes Involved

10. The statutes involved are:

(a) The Merchant Marine Act of 1936, as amended, 46 U.S.C. 1101, *et seq.*, particularly the provisions of Section 810 thereof, 46 U.S.C. 1227, reading as follows:

> "Sec. 810. It shall be unlawful for any contractor receiving an operating-differential subsidy

under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(b) The provisions of the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, particularly 5 U.S.C. §§ 553, 554, 556, and 557, requiring that orders based upon an administrative record he supported by reliable probative and substantial evidence; and 5 U.S.C. 702-706, providing for judicial review of agency action and for relief against action which is arbitrary, capricious, an abuse of discretion, not in accordance with the law or in excess of statutory authority, or unsupported by substantial evidence; and

(c) 28 U.S.C. 2201-2202, providing for declaratory judgment and injunctive relief.

Statement of the Case

11. Plaintiffs are parties to 20-year operating-differential subsidy contracts with the United States under the Merchant Marine Act, 1936, 46 U.S.C. §§ 1101, *et seq.*, administered by the Board. They have a substantial pecuniary interest in the forfeitures imposed by the Secretary's action of September 9, 1974 (Attachment A) herein sought to be set aside.

12. Plaintiffs, during 1965 and 1966, were members of a conference of 19 steamship companies, known as AGAFBO, operating under Agreement No. 8086-2 entered into and approved by the Federal Maritime Commission under the provisions of Section 15 of the Shipping Act of 1916 (46 U.S.C. 814). At all relevant times they provided common carrier service with United States-flag vessels between United States Atlantic and Gulf ports and ports in Europe. The conference, was formed at the request of the Military Sea Transportation Service ("MSTS"), a division of the Department of Defense ("DOD"), to discuss and negotiate terms for the carriage of military cargos between those areas.

13. In 1964 a van line company which provided door-to-door transportation of military household goods, named Liberty-PAC International Corp. (whose principals shortly thereafter formed Sapphire Steamship Lines, Inc.) entered into negotiations with DOD for the transportation of military household goods at rates lower than those charged the DOD by Plaintiff members of the AGARBO group. DOD officials informed Plaintiffs of the proposed lower rates and urged Plaintiffs to take steps to reduce their rates in an equivalent amount and instituted a series

of steps to force such reduction, including reserving cargos for Sapphire and continuing pressure on Plaintiffs to meet those rates. As a result of these pressures, AGAFBO ultimately, under dates of March 29, 1965 and May 23, 1965, equalized its transportation charges with those of Sapphire, but did not undercut the Sapphire rates. As a result, DOD saved an estimated $14 million in ocean transportation charges at the expense of the AGAFBO lines.

14. The rates remained in effect until February 28, 1966, at which time the rates were returned to their former levels, thus ending the rate equalization with Sapphire, the latter continuing to carry cargos at the lower rates. Sapphire ceased operations in March 1967 and went into bankruptcy.

15. In 1965 the Federal Maritime Commission instituted a proceeding styled FMC Docket 65-13, *Rates on United States Government Cargos*, to determine whether the rates charged for transportation of military cargo were excessive. The FMC determined (11 FMC 263 (Dec. 8, 1967)) that AGAFBO had made an adequate showing that their military cargo rates were not too high; it held, however, that the rate reduction to the Sapphire levels were too low and accordingly violated the Shipping Act of 1916.

16. On December 19, 1967, Marshall Safir, a 50 percent stockholder in Sapphire Steamship Lines, and an officer, requested the Board to invoke the provisions of Section 810 of the Merchant Marine Act, 1936, and to terminate all further payments of subsidy and recover all past subsidies from the subsidized members of AGAFBO, including Plaintiffs. It was held that Mr. Safir had standing to ask the courts to order the Board to institute a proceeding under Section 810. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).

17. By order of October 24, 1969, the Board instituted a hearing in which Plaintiffs, among others, and Mr. Safir, *pro se*, participated as parties, resulting in its decision of April 16, 1973, holding that the members of the AGAFBO conference, including Plaintiffs, had violated Section 810 of the Merchant Marine Act, 1936, by reason of the rate equalization with Sapphire. The Board held, however, that it was not required to order forfeiture of all subsidies relying on a decision rendered in collateral proceedings by the Second Circuit (*Safir* v. *Gibson*, 432 F.2d 137, *cert. denied*, 400 U.S. 850 (1970)), but that it had discretion to mitigate penalties in the light of circumstances presented. The Board's decision of April 16, 1973 ruled that the penalties to be imposed would be that portion of subsidies earned from operations on the Sapphire routes during the 11-month period of alleged violation as military cargo revenue bore to commercial cargo revenue during that period, with certain other mitigating adjustments based on circumstances particular to the individual lines. The Board ordered the lines to compute the forfeitures due under the formula adopted in its decision of April 16, 1973, the figures were audited, and the amount of the forfeitures was fixed by its Final Order on Recoveries of October 15, 1973 (14 SRR 77). No forfeitures were required of certain AGAFBO members (known as the "non-trade" lines), which did not operate in the North Atlantic and therefore did not compete directly with Sapphire, or participate in establishing the rates for that trade. Their violation was considered "technical" only. The Board rejected four legal grounds advanced by Plaintiffs herein under which they contended that Section 810 was improperly interpreted and applied; and that if properly interpreted and applied, no forfeiture of subsidy would be lawful.

18. Plaintiffs appealed to the Secretary of Commerce under applicable procedure (Departmental Order No.

117-A, as amended, Section 6, 46 C.F.R. 202.1), asking him to review and set aside the decisions and orders of the Maritime Subsidy Board above described. By Order of September 9, 1974 (14 SRR 928), the Secretary granted the appeals of the Plaintiffs herein, among others, and reduced the forfeitures assessed by the Board by one-half, on the ground that the record indicated that the United States Government induced the rate reduction and equalization with Sapphire and received substantial financial benefit from such reduction. The respective forfeitures decreed by the Secretary with respect to Plaintiff American Export Lines, Inc., was $18,160; as to Plaintiff Lykes Bros. Steamship Co., Inc., $381,446; as to Moore-McCormack Lines, Incorporated, $193,276; and as to United States Lines, Inc., $487,292.

19. Plaintiffs allege that the Secretary and the Board misinterpreted and misapplied Section 810 of the Merchant Marine Act, 1936, as a matter of law in the following four respects:

(a) By its terms, Section 810 may be invoked only by a "common carrier", *i.e.*, a steamship operator offering service to the public at large. The record demonstrates that Sapphire never operated a bona fide common carrier service but confined its operations almost exclusively to the carriage of military cargo; accordingly, Section 810 may not be invoked by Sapphire or by the United States.

(b) Assuming, arguendo, that Sapphire operated a common carrier service, Section 810 does not apply since it has been consistently held by the Board and its predecessor agencies that Section 810 may be invoked only where a subsidized line has unfairly excluded another United States-flag carrier from conference membership and, furthermore, that the Section does not apply to rate practices. Sapphire was never excluded from AGAFBO but rather declined to join the AGAFBO conference.

(c) Assuming both that Sapphire maintained a common carrier service and that Section 810 applies to rate practices, nevertheless, the sanctions of Section 810 have been held to operate prospectively only where, as here, the alleged violation involves the question of the reasonableness of a rate.

(d) The United States, having exercised pressure to induce the AGAFBO lines to equalize their rates with those of Sapphire and then having used those rates to its benefit at the expense of the Plaintiffs, is estopped as a matter of law from invoking the penalties of Section 810. It is unconscionable and inequitable for the United States having taken advantage of the rate equalization instituted on its own demand, to penalize Plaintiffs a second time by demanding refund of past earned subsidies.

Relief Requested

20. WHEREFORE, Plaintiffs pray this court for the following relief:

(a) An order reversing and setting aside the Order of the Secretary of Commerce dated September 9, 1974, and the decisions and orders of the Maritime Subsidy Board rendered April 16, 1973, and October 15, 1973, respectively, insofar as they affect Plaintiffs;

(b) A permanent injunction against the carrying out by Defendants of the foregoing decisions and orders;

(c) An order requiring Defendants, if recovery of subsidy has been effected by set-off or paid under protest, to refund any such sums so set off or paid; and

(d) To grant such other and further relief as to the Court appears just in the premises.

Respectfully submitted,

J. FRANKLIN FORT
T. S. L. PERLMAN
WILLIAM H. FORT
Kominers, Fort Schlefer & Boyer
1176 F Street, N.W.
Washington, D.C. 20006
(202) 467-5900
Attorneys for Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Incorporated

JAMES N. JACOBI
Kurrus and Jacobi
2000 K Street, N.W.
Washington, D.C. 20006
(202) 331-9777
Attorney for American Export Lines, Inc.

ELMER C. MADDY
Kirlin, Campbell & Keating
120 Broadway
New York, New York 10005
(212) 732-5520
Attorney for United States Lines, Inc.

December 6, 1974

Appendix J—Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 74-1788

AMERICAN EXPORT LINES, INC., *et al.*,
Plaintiffs,

—v.—

FREDERICK B. DENT, individually, and as Secretary of Commerce, et al.,
Defendants.

Answer

The answer of defendants Dent, Blackwell, Dawson, Van Doren and Casey admits, denies and alleges as follows:

First Defense

Answering the complaint by paragraphs:

1. Denies any facts which might be found herein, except it is admitted that Attachment A hereto is a true and correct copy of defendant Dent's order of September 19, 1974, and that the Maritime Subsidy Board orders referred to exist, are correctly reported as alleged, and alleged that these three orders speak for themselves. It further admits the judicial amount alleged. Defendants further allege that by characterizing defendants' orders requiring a recovery of public subsidy money as working a forfeiture or "penalty" of monies "earned", plaintiffs materially misstate the true facts. Although plaintiffs use such terms throughout their complaint, this allegation will not be repeated.

2. Admits.

3-9. Admits, except it is denied that defendant Dawson issued the October 15, 1973, order, and it is further denied that any defendant is suable individually. To the contrary, defendants are suable, if at all, solely in their official capacities and not otherwise.

10. Requires no answer.

11. Admits, except it is denied that United States Lines is now party to any subsidy contract, having ceased to be so in August 1970.

12. Admits, except it is denied that the conference was formed at the request of the Military Sea Transportation Service.

13. Admits, except it is denied that any Government official urged or forced plaintiffs in any manner to reduce their rates, or that plaintiffs or their conference reduced their rates as a result of any pressure. It is further denied for lack of information that the United States saved $14,000,000 or any other amount.

14. Denies, except it is admitted and alleged that the rates in question remained at their unreasonably low level until February or March, 1966, at which time they were increased. It is further admitted that Sapphire continued for less than a year to carry cargo at rates lower than those charged by plaintiffs, after which time it went into bankruptcy.

15. Denies, except it is admitted that the Federal Maritime Commission made a determination correctly reported at 11 F.M.C. 263, which determination speaks for itself.

16. Admits.

17-18. Denies any facts which might be found herein, except it is admitted that the alleged judicial and administrative proceedings occurred. The records of these proceedings speak for themselves.

19. Requires no answer.

20. Requires no answer.

Second Defense

21. Plaintiffs are estopped and barred by *res judicata* principles from maintaining this action, in that the subject matter thereof could and should have been litigated in the currently pending action of *Safir* v. *Blackwell, et al.*, E.D.N.Y. — Civ. No. 68-643.

Third Defense

22. Defendants are subject to this review action, if at all, in their official and not in their individual capacities.

WHEREFORE, defendants pray that plaintiffs' action be dismissed with prejudice and with costs, and for such other and further relief as the Court may deem appropriate

EARL J. SILBERT
United States Attorney

By: ....
Assistant U.S. Attorney
ALLEN van EMMERIK, Trial Attorney
Admiralty & Shipping Section
U.S. Department of Justice
Washington, D.C. 20530
Tel. No. 202-739-3373
Attorneys for Defendants

Appendix K—Final Order on Recoveries of MSB Dated October 10, 1973

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARTIME SUBSIDY BOARD

DOCKET No. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re alleged violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

FINAL ORDER ON RECOVERIES

Chairman, Robert J. Blackwell and Alternate Member, James S. Dawson, Jr.

Introduction

On April 16, 1973, the Maritime Subsidy Board (Board) served an Opinion and Order in this proceeding[1] which concluded that all respondent members of Atlantic and Gulf American Flag Berth Operators had violated Section 810 of the Merchant Marine Act, 1936, as amended (Act), by certain actions which unjustly discriminated and unfairly competed against Sapphire Steamship Lines Inc. That decision also set forth, on an estimate basis only, the operating-differential subsidy (ODS) recoveries,

[1] The Opinions and Order is reissued on this service date to reflect corrections for clerical errors appearing in the original served decision. It is attached as an Appendix to this Final Order on Recoveries.

if any, owed by each respondent, for such violations upon due consideration of mitigating circumstances. Trade respondents—American Export Lines, Inc. (AEL), Bloomfield Steamship Company (Bloomfield, Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines Incorporated (Mormac), and United States Lines, Inc. (USL) —and Public Counsel were given an opportunity to submit their views and supporting documentation on the exact ODS amounts recoverable under said decision. All trade respondents filed such submissions and most of them filed statements requested by Public Counsel on the source and availability of documents supporting their recovery positions. Public Counsel directed a MarAd audit of the submissions of the trade respondents based on the limited available existing records. He thereafter filed a Final Report, twice supplemented, which included the reports of such audit and which responded to the submissions of the trade respondents. Upon consideration of these papers, we find and conclude, for the reasons set forth hereinafter, that trade respondents owe in ODS recoveries for violation of Section 810 of the Act, as found in the Opinion and Order served April 16, 1973, an aggragate of $2,388,463.16.

Discussion

We consider first the propriety of issuance of this Order at this time and thereafter the ODS recovery from each of the trade respondents separately. It is understood that the positions on recoveries by all the trade respondents are without prejudice to their contentions of not having violated Section 810 of the Act.

PROPRIETY OF THIS ORDER AT THIS TIME

We are cognizant of the outstanding petition of Marshall P. Safir to the Supreme Court of the United States for a writ of certiorari to the Second Circuit to reverse that lower court's order denying Mr. Safir's petition to reverse the Opinion and Order served April 10, 1973. (sic.) There is no judicial action in connection with that unresolved petition that precludes the issuance of this Final Order.[2] In fact, the Board is under a judicial order on mandate to proceed "without delay" with this decision.[3]

AEL'S RECOVERY

AEL states that it "has established that the Board's approximate mathematical calculation is exact and that under the formula AEL should return $38,036 to the Government." Public Counsel laments the lack of original records from which to verify AEL's figures but suggests that if such records were not promptly located, then final figures be determined from the audit report of AEL's submission.

The MarAd audit report concluded that AEL's submission could not be verified because of the lack of supporting data, such as individual manifests and bills of ladings, from which AEL's submission was drawn. AEL indicated it is still in the process of locating such data. The audit report also claimed AEL's maintenance and repair ODS figure was understated by $1,695.10 resulting in understatement of subsidy due for violation of Section 810 of $14.25 (13.5% of $1,695.10 times 24.92% military cargo percentage, less 25% mitigation reduction). AEL has not commented on this correction asserted by MarAd's auditors.

We find and conclude that AEL owes an ODS recovery of $38,050.25 for violation of Section 810. In the event additional pertinent records are uncovered subsequent to this order, which would provide a basis for substantially changing the exact ODS recovery from AEL, then AEL's recovery can be reopened. Such eventuality seems extremely unlikely given the fact that such records are now several years old with all the sundry happenstances that could have occurred to them and also given the amount of effort purportedly already exerted to locate such records.

BLOOMFIELD'S RECOVERY

Bloomfield claims that it owes $119,900.54 as ODS recovery under the Board's Opinion and Order as compared to the $140,450 estimated by the Board in that decision. It contends that any recovery is subject to interest payments owed by the Government for withholding from Bloomfield $121,893.67 in ODS payments accrued in 1965. Public Counsel supports the MarAd auditors, report on Bloomfield's submission. The report indicates that there were insufficient supporting data available to express an opinion as to the overall accuracy of the submission, but that to the extent Bloomfield's manifests were available they confirmed that company's recitation of cargo reports.

[2] The Safir petition would not stay the action of the lower court unless the Supreme Court or the Court of Appeals so directed, 28 U.S.C. § 2101(f) (1907). Neither the Supreme Court nor the Court of Appeals have so directed. Even if the lower court's order were stayed, it is doubtful that such stay would bar the Board from proceeding in the absence of some judicial communication to MarAd, the Department of Commerce, or the Department of Justice.

[3] *Safir* v. *Gibson*, 432 F.2d 137, 143 (2d Cir.), *Cert. denied*, 400 U.S. 942 (1970), Order on Mandate of the U.S. Court of Appeals for the Second Circuit, Docket 680643 (E.D.N.Y. 1970).

Bloomfield's claimed recovery excludes any consideration for revenue earned from military cargo carriage at undisputedly lawful rates during the period of violation of Section 810. Bloomfield, along with Lykes and Mormac, argues that under the rationale of the Board's decision such revenue was to be excluded in calculating the ODS recovery. The applicable principle of the Board's decision, according to Bloomfield, is that "the penalty should bear the same percentage to accrued subsidy for the violation period as earnings from all cargo carried at the alleged illegally reduced rates bear to earnings from all cargo." Lykes adds that the Board assumed there was no such military cargo whereas in fact such cargo was carried "at the constant rate levels which did not unfairly affect the Sapphire operation." Public Counsel indicates that such adjustments advocated by Bloomfield, Lykes and Mormac "appear to be refinements of the principle enunciated by the Board in the outstanding Opinion and Order. . . ."

The adjustment sought by Bloomfield, Lykes and Mormac is not a refinement of any principle previously established in this proceeding. In the Opinion and Order we made the legal conclusion that under Section 810 all ODS paid during past violations may be recovered and that we have discretion to mitigate such recoveries. The recoveries for all trade respondents were mitigated to the following percentage formula of ODS:

> "After carefully considering all of the facts and policy objectives of the Act applicable to trade repondents' violations, we are persuaded to further limited their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade route whereon the condemned rate reductions were in effect." (p. 61)

This formula was restated for Lykes as follows:

> "Hence, the amount to be recovered from Lykes is the percentage of ODS received from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received thereform during the period of violation." (p. 62)

The underlying principle of this formula is that recoveries would be mitigated to a certain level—a ratio of ODS involving all military cargo revenue received on the route during the violation.

Further, at the time of the Opinion and Order the Board was aware that its formula took into account some military cargo by trade respondents at lawful rates even though the exact quantum of that carriage was not of record. For instance, the Board's decision referenced condemned military cargo rate reductions which occurred "during" the period March 29, 1965 to March 1, 1966; the Chief Judge's Initial Decision and the FMC decision in Docket No. 65-13[4] referred to several condemned military rate reductions that occurred subsequent to March 29, 1965; and Public Counsel, in particular discussed these other condemned military rate reductions in his proposed Findings of Fact at 20-21. It follows that it was apparent that some military cargo was carried by respondents after March 29, 1965, at lawful rates before the rates on such cargo were unlawfully reduced. However, preponderantly trade respondents carried military cargo at the condemned rate reductions on the Bordeaux/Hamburg range during the period of violation.

---

[4] Docket No. 65-13, *Rates on Government Cargoes, 11 F.M.C.* 263, 287 (1967).

Moreover, we are not persuaded to extend further our discretion in this instance to reduce the recoveries owed by trade respondents for violation of Section 810. In the Opinion and Order we carefully considered all the asserted justification for such mitigation and now new justification is presented by trade respondents in their latest submissions.

Bloomfield also asserts that the Board owes interest under its ODS Contract No. FMB-27 on the final audited subsidy voucher for $121,893.67 from June 1966 (the date of submittal of "a voucher for the remaining subsidy due") to June 1971 (the date of a court order enjoining subsidy payment [5]) and beyond. The subsidy contract requires payment of net subsidy due upon final accounting which shall be paid as soon as practicable upon termination of the subsidy agreement. Bloomfield claims that administrative agencies can and do permit interest to be taken into account in making contract adjustments and settlements and that interest is assessed when the Government fails to fulfill its obligation as in this instance.

Public Counsel contends that the applicable voucher was dated January 2, 1970, after commencement of this proceeding, and that such voucher included the recital by Bloomfield that all terms of the subsidy contract had been complied with. He argues that since the purpose of this proceeding was to determine whether Bloomfield was in compliance with its contract and since Bloomfield was in defunct status, there was ample basis under the contract to give the voucher cautious consideration. Further, he

[5] Memorandum Incorporating Findings of Fact and Order dated June 22, 1971, and resettled July 26, 1971 (E.D.N.Y.)

cites the statutory provision that interest is not assessed against the Government except where explicitly allowed by statute or contract, 28 U.S.C. §§ 2411, 2516 (1970), and distinguishes cases cited by Bloomfield. He asserts that neither Bloomfield's subsidy contract nor any implementing regulations permit recognition of interest in the event that a final accounting is not processed immediately for payment.

We completely concur with Public Counsel's position on this matter that there has been no improper or illegal withholding of subsidy and that no statute, subsidy contract, or implementing regulation permits recovery of interest against the Government for such withholding.[6] Consistent with this view we concluded in the outstanding Opinion and Order that interest charges are not recoverable under Section 810 of the Act since interest is not and cannot be an element of ODS payment.

In conclusion, we find that Bloomfield owes $139,039.60 in ODS recovery for violation of Section 810 of the Act

[6] Bloomfield cites *Bell* v. *United States*, 404 F.2d 975, 984 (Ct. Cl. 1968), and *Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968). In *Bell* the Court of Claims found that the contract under Department of Defense policy permitted recovery of interest under the changes clause on moneys borrowed by the contractor necessitated by the change. Neither the Department of Commerce nor MarAd have a policy of permitting recovery of interest under construction or operating subsidy contracts. See *Sun Shipbuilding & Dry Dock Company* v. *United States Lines, Inc.*, 12 S.R.R. 551, 598 n. 39 (1971). In *Peoria* the Supreme Court did not allow interest as part of damages for the Government's breach of its fiduciary obligations under treaty since "the United States is not liable for interest on judgments in the absence of an express consent thereto. . . ." 390 U.S. at 473 n. 6. It therefore suggested that if an interest rate *measure* were adopted for determining the damages, it must be simple and not compound interest.

($750,551.12 ODS times 24.7% military to total freight revenues times 75% mitigation reduction) and that no interest payments from the Government for withholding accrued subsidy offsets that recovery. The withheld $121,893.67 in ODS payments is hereby acknowledged as partial satisfaction of amounts owing for such violation.

LYKES' RECOVERY

Lykes calculates the ODS recovery due the Government in this proceeding is $764,264.53 compared to the estimated recovery of $1,130,123 in the Board's decision. The difference is attributed to more exact figures and calculation of ODS on a per diem rather than on a termination basis. Lykes contends the recovery should be reduced to $703,920.67 so as to exclude any subsidy paid for carriage of military cargo not carried at the condemned reduced rates. Public Counsel adopts the MarAd audit report on Lykes' submission, which report, except for a minor correction, concludes that Lykes' submissions properly reflect the amount of subsidy subject to recovery in this proceeding. The one correction refers to Lykes' overstatement of subsidy by approximately $5000. Taking into account the correction, Lykes would owe in recovery, based on the Board's Opinion and Order, $762,891.99 ($2,725,-587.69 ODS times 27.99% military to total freight revenues ratio).

We have previously discussed and decided not to accept the advocated adjustment for revenue from carriage of military cargo at lawful rates during the period of violation. As for Lykes' different method of accounting we note that the accounting bases for all trade respondents vary considerably. However, these different bases have been reviewed by MarAd auditos, who have concluded, to the

extent underlying data is available, that each submission is reasonably responsive to the directive in this proceeding. We concur with that judgment. Accordingly, we find and conclude that Lykes owes $762,891.99 in ODS payments for violation of Section 810.

MORMAC'S RECOVERY

During the period of violation Mormac operated on Trade Route No. 6 with the authority to make calls on ports in the Bordeaux-Hamburg range (Trade Route 7-8-9) in certain instances. Mormac suggests that the subsidy paid for operation on the Bordeaux-Hamburg range be computed from the radio of revenue carried on that range to the revenue earned on the entire trade route (T.R. 6-7-8-9). On such basis it calculates the ODS recovery under the Board's outstanding Opinion and Order as $281,497 instead of the Board estimated recovery of $492,443. Mormac's calculation includes three adjustments to eliminate (i) revenue from cargoes carried on unsubsidized voyages during the strike period in June, July and August of 1965, (ii) revenue from carriage of refrigerated cargoes at lawful rates on the Bordeaux-Hamburg range, and (iii) revenue from other military cargo carried at lawful rates on the Bordeaux-Hamburg range. Public Counsel offers no objection to Mormac's proposed recovery and relies on the MarAd audit report of Mormac's submission. MarAd's auditors concluded that Mormac's submission was a reasonable representation of the data required in this proceeding although they could not give complete verification in the absence of certain underlying data.

As previously discussed, we have already decided not to make any adjustment in recoveries for carriage of mili-

tary cargoes at lawful rates on the Bordeaux-Hamburg range during the period of violation. On the other hand, we are persuaded to make an adjustment in Mormac's recovery for revenues earned from cargoes carried on unsubsidized voyages during the strike period. No Government support was paid for such operation and Mormac held no advantage over Sapphire Steamship Lines Inc. by such unsubsidized operation.

With respect to Mormac's recovery and military reefer cargo the Board made the following statement in its Opinion and Order:

> "The military cargo revenue figures include revenue from carriage of military refrigerated cargo since we are not persuaded to further mitigate Mormac's recovery to exclude such cargo, even though Sapphire's carriage of such cargo was of a limited amount." (p. 65, note 63)

The essential point is that the Board refused to further exercise its discretion to limit Mormac's recovery on account of this reefer carriage. Mormac may be contending that the amount of Sapphire's carriage of this cargo is relevant because Sapphire could not have sustained any injury from Mormac's military reefer carriage and therefore its recovery should be accordingly mitigated. The reference to the "limited amount" of military refrigerated cargo carried by Sapphire was to Mr. Safir's testimony that a Sapphire vessel had carried a reefer container (which presumably contained refrigerated cargo) although the Sapphire ships did not have reefer capacity built into them. However, the quantity of military refrigerated or reefer cargo carried by Sapphire is not relevant because we have already held that, "even as a factor of mitiga-

tion, . . . [t]his proceeding is not concerned with the injury to Sapphire" but rather with "policies regarding recoveries from respondents for actions intending injury to Sapphire and affecting the welfare of the U.S. merchant marine." [7] Mormac's analogy to the following finding on USL's passenger service is not apposite:

> "In view of the dissimilarity of passenger and cargo ship operations and of Sapphire having operated no passenger ships, we are persuaded, as a matter of discretion, that recovery from USL for past violation of Section 810 should not be related to subsidies received for such passenger ship operations. No other trade respondent operated any passenger ship on a subsidized service on the U.K./B-H range during the period of violation." (p. 53)

This unique circumstance is not comparable to Mormac's carriage of military reefer cargo. Mormac did not have a military reefer service but rather presumably a commercial freight service. USL had a passenger service.

Accordingly, we find and conclude that Mormac owes for violation of Section 810 of the Act $386,776.56 in ODS recovery ($968,091 ODS times 53.27% military [$2,454,640] to total freight revenues [$4,607,364] ratio times 75% mitigation reduction), which amount will be withheld from the ODS accrued during the period of violation and not yet paid pursuant to court injunction.

USL's Recovery

USL calculates its recovery as $1,056,074.62 as contrasted to the estimated recovery of $969,751 in the

[7] Opinion and Order, served April 16, 1973, at 36.

Board's Opinion and Order. Public Counsel supports the MarAd audit report of USL's submission and recommends that the Board not await the possibility of further USL records being located but urges that the final decision be issued "subject to reopening in the event such records are trieved." MarAd auditors could not certify to the complete accuracy of the USL submission because of the absence of underlying manifests and bills of ladings but did conclude that the submission, with minor adjustments, was a reasonable representation of the data required in this proceeding. The significant correction concerned revenue statements. The auditors used figures reflected in the applicable Estimated Operating Result Statements while USL relied on data in Vessel Operating Statements. The latter Statements have apparently been destroyed in the ordinary course of USL's business. The net effect of this procedure was to increase the subsidy applicable to military cargo by $9,665.53 or a recovery of $1,061.704.76.

We find and conclude that USL owes $1,061,704.76 for violation of Section 810 of the Act, based to the extent possible, on existing records. As in the situation of AEL, this determination is final but if additional pertinent records should unexpectantly be uncovered which would materially change USL's recovery, that recovery can be readjusted.

CONCLUSION

Based upon the Opinion and Order served April 16, 1973, in this proceeding and the foregoing discussion, we find and conclude that:

1) All respondents violated Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo

carried in the U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period of March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield Steamship Company, only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Lines Inc., and

2) In consideration of pertinent mitigating circumstances respondents owe the following ODS recoveries, if any, subject to readjustment upon the unlikely discovery of additional pertinent documentation which would substantially alter said recoveries:

(a) Respondents American President Lines, Ltd., Farrell Lines Incorporated, Grace Lines, Inc. (presently Prudential-Grace Lines, Inc.) and Prudential Lines, Inc. (presently Prudential Steamship Company, Inc.), who did not compete with Sapphire and whose violations are technical only, no amount;

(b) Respondent Lykes Bros. Steamship Co., Inc. $762,891.99 to be accounted for on terms satisfactory to the Government;

(c) Respondent American Export Lines, Inc. $38,050.25 to be accounted for on terms satisfactory to the Government;

(d) Respondent Moore-McCormack Lines, Incorporated $386,776.56 to be withheld from operation subsidy amounts presently owed and incurred during the period of violation;

Appendix K—Final Order on Recoveries of MSB Dated October 10, 1973

(e) Respondent Bloomfield Steamship Company $139,039.60 partially to be withheld from operating subsidy amounts of $121,893.67 accrud during the period of violation but not yet paid;

(f) Respondent United States Lines, Inc. $1,061,-704.76 to be accounted for on terms satisfactory to the Government.

SO ORDERED BY THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION

Date: October 10, 1973

/s/ AARON SILVERMAN
AARON SILVERMAN
Assistant Secretary

Appendix L—Memorandum for the Federal Respondents in Opposition

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Memorandum for the Federal Respondents in Opposition

Petitioner, an owner of Sapphire Steamship Company, requested the Maritime Subsidy Board to recovery subsidies paid to certain named members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) for their violations of Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended ,46 U.S.C. 1227, by having acted in concert to reduce selected military cargo rates on certain routes in order to drive Sapphire from those routes (Pet. App. 16a-17a). The Maritime Subsidy Board then instituted an investigation to determine whether those members of AGAFBO receiving operating—differential subsidies under the Act had so violated Section 810.

On April 16, 1973, the Board issued a preliminary decision finding that all subsidized members of AGAFBO had violated Section 810, but that recovery of subsidies was proper only from those who were in direct competition with Sapphire (Pet. App. 19a, 86a-87a). The exact

amounts to be repaid were to be determined by a formula based on the volume of military cargo carried at reduced rates (Pet. App. 77a-78a), and those subject to the order to repay were given an opportunity to submit their views on the amounts recoverable (Pet. App. 87a). The order further stated (App. 87a):

> An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final.

Without awaiting the further proceedings called for by the order, or for a final decision, petitioner filed in the United States Court of Appeals for the Second Circuit a "motion" to overturn the Board's order and to require greater penalties from all respondents (Pet. App. 119a-120a).[1] The respondents opposed the motion and contended that the court of appeals lacked jurisdiction to conduct the judicial review sought by petitioner and that, in any event, such review was premature. The court of appeals denied petitioner's motion (Pet. App. 1a). Petitioner seeks review of that denial.

1. The court of appeals had no jurisdiction to review directly the order in question. Absent a specific statutory grant of jurisdiction to review orders of administrative agencies, a court of appeals has no jurisdiction to entertain such an action as a court of first instance. *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *Turkel* v. *Food and Drug Administration*, 334 F.2d 844 (C.A. 6), *certiorari denied*, 379 U.S. 990; *Schwab* v. *Quesada*, 284 F.2d 140 (C.A. 3); *City of Dallas* v. *Rentzel*, 172 F.2d 122 (C.A. 5), *certiorari denied*, 338 U.S. 858. There is no statute conferring such jurisdiction in this case.[2]

[1] Petitioner's motion was filed under the caption of an early appeal in this unique and much-litigated matter in which the court of appeals had reversed a district court's dismissal of petitioner's complaint seeking to compel the federal respondents (or the predecessors) to institute proceedings of the type now being challenged by petitioner. *Safir* v. *Gibson*, 417 F.2d 972 (C.A. —). The conduct of those proceedings was also the subject of another district court challenge by petitioner and review by the court of appeals. *Safir* v. *Gibson*, 432 F.2d 137 (C.A. 2), certiorari denied, 400 U.S. 850.

2. In any event, the decision of the Maritime Subsidy Board of which petitioner sought review was not a final order and thus was not ripe for review. The Board itself stated that the decision would become final only after an additional order was issued. The test for finality is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Boston Marine Terminal Association of Rederiaktiebobolaget Transatlantic*, 400 U.S. 62, 71. The Board's explicitly interlocutory decision in the instant case is not final under that test. No legal consequences flow from the order, no rights or obligations have been determined finally, and judicial review would disrupt the orderly functioning of the administrative process in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

[2] Indeed, jurisdiction over suits brought to recover damages arising from unjustly discriminatory or unfair practices of subsidized carriers is vested in the district courts. 46 U.S.C. 1227. No further provision is made for review of decisions of the Maritime Subsidy Board. To the extent that the Administrative Procedure Act might permit review, such a review proceeding could be initiated only in the district court. See *Rettinger* v. *Federal Trade Commission*, 392 F.2d 452, 457 (C.A. 2).

Appendix M—Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, August 3, 1973

IN THE

Supreme Court of the United States

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

[Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, August 3, 1973]

MARSHALL P. SAFIR, *Pro Se*,
41 Flatbush Avenue,
Brooklyn, N. Y. 11217
(212) 858-2700

Appendix M—Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, August 3, 1973

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 16, 1973 (App. #1, p. 1).

Opinions Below

The first opinion of the Court of Appeals is reported at 417 F.2d 972 (1969) (App. #12, pp. 163a-173a). The second opinion of the Court of Appeals is reported at 432 F.2d 137, 142 (1970), *cert. denied,* 400 U.S. 972 (App. #11, pp. 151a to 162a). The third decision of the Court of Appeals is not yet reported but is listed herein as Appendix Exhibit 9 on pages 142a-144a. The fourth decision appears herein as Appendix #1, p. 1.

The recent opinions of the United States District Court for the Eastern District are unreported. They are listed here as Appendix Exhibit 8, pp. 138a-142a and Appendix Exhibit 10, pp. 145a-150a.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

Section 810 of the Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. 1227 (App. Ex. 14, p. 197a).

Question Presented

After an adjudicatory hearing (Docket S 243) mandated by the United States Court of Appeals, the Maritime Subsidy Board, the agency entrusted with the responsibility and endowed with the expertise,[2] has found after exhausting the administrative process that 46 U.S.C. 1227 was violated by all subsidized members of a steamship conference (AGAFBO).[3]

[1] These decisions are sequals to earlier decisions in Docket 68 C 643 U.S.E.D.N.Y. reported *sub. nom Safir* v. *Gulick,* 297 F. Supp. 630 (E.D.N.Y. 1969), *reversed sub. nom, Safir* v. *Gibson,* 417 F.2d 972 (2d Cir. 1969) and which forms part of this petitioner's appendix in Petition #388—1970 (400 U.S. 972, *cert. denied*).

[2] Primary responsibility for administration of the Act is vested in the Secretary of Commerce by Reorganization Plan No. 7 of 1961, 75 Stat. 840 and delegated by him to the Maritime Administration and Maritime Subsidy Board, 27 Fed. Reg. 3637 (1962).

[3] Appendix Exhibit A, pp. 15a-87a.

The question is whether the Maritime Administration and Maritime Subsidy Board through the respondent officials are now under a mandatory duty imposed by Section 810 of the Merchant Marine Act 1936, 46 U.S.C. 1227, to invoke the sanction of the Act by recovering all operating differential subsidies paid to these companies during the eleven month period of violation.[4]

Statement of the Case

This case was first brought to this Court by this petitioner three years ago as Petition #388 of the October Term, 1970. At that time the petition was denied based primarily on the prematurity of its posture. "The administrative process, far from being exhausted, had hardly begun." *Mr. Justice Douglas, however, was of the opinion that certiorari should have been granted at that time.* It is no small irony that this Court, during that same term, decided the case on which this petitioner leans heavily to support his contention that the Court of Appeals was in error in granting wider and wider discretion to the Maritime Subsidy Board in a situation where there was specific "law to apply."[5]

The time that has elapsed since then has not wanted for legal activity—in the past three years the following actions took place:

1. In May 1971 after a *"prima facie"* finding by the hearing examiner in S 243 that Sapphire Steamship Lines

[4] The Secretary of the Maritime Subsidy Board has by certified attachment (See App. Exhibit 5, p. 122a) set forth the amount of these recoveries.

[5] *Citizens to Preserve Overton Park, Inc.* v. *Volpe* (App. 13, p. 175a).

met all the criteria necessary to qualify for the protection of Section 810, this petitioner moved in United States District Court, Eastern District of New York, for an injunction to prevent payment of $80 million of past subsidies to the violators pending the administrative agency's decision in S 243. Judge John Dooling, in part, granted injunction (App. Ex. 10, pp. 145a-150a). By the time the relief was effective, however, payment of all but $1 million had been paid to the violators.

2. In May, 1972, an "initial" decision by the Hearing Examination (by this time the Chief Administration Law Judge) issued wherein he found that the so-called "Trade Respondents" had violated Section 810 and recommended certain subsidy recoveries he felt within the discretion of the agency to formulate based on the Court of Appeals mandate[6]—albeit 13 months after this Court's decision in *Citizen to Preserve Overton Park* v. *Volpe.* This petitioner moved in the District Court for an order requiring the Secretary of Commerce to escrow all amounts payable to certain of the violators in the sale of their passenger ships pending a "final" decision by the Maritime Subsidy Board in S 243. Judge Dooling denied the motion (See App. Ex. 8, pp. 138a-141a). Petitioner then appealed to the Second Circuit not only for the escrow of the funds but because his right to participate with the United States in the recoveries was threatened by Judge Dooling's questioning of his standing under 31 U.S.C. 231, 232 (see App. Exs. 6 and 7, pp. 124a-137a).

The Court of Appeals affirmed but left open the question of petitioner's rights under 31 U.S.C. 231, 232. The

[6] See, App. Ex. A, pp. 36a-37a, Dated April 16, 1973 as it conflicts with App. Ex. 13, pp. 183a-187a, Dated March 2, 1971.

decision contained a broad implication of a wider discretionary grant to the agency to minimize both the amount of recovery from the violators and to reduce the number of lines in the culpable group.[7]

On April 16, 1973 the final decision of the Maritime Subsidy Board in S 243 was served (App. Ex. A).

The Board found that all respondents violated Section 810 and then exercised the discretion it felt the Court of Appeals had granted by mitigating the penalties to an inconsequential level. Petitioner then on April 27, 1973 moved the Court to set aside the discretionary conclusions 2A through 2F of the decision (see App. Ex. 3, pp. 11a-14a and App. Ex. 2, pp. 2a-3a). The Court of Appeals denied (App. Ex. 1, p. 1) hence this petition.

Reason for Granting the Writ

The primary reason is that the Court of Appeals' interpretation of Section 810 in its decision 417 F.2d 972, 1969 and in its decision 432 F.2d 137, 142, 1970, and its decision in Docket 72-1753 unreported, granted broader and broader discretion by word and implication to the Government, and that this discretion so granted is in direct conflict with the decision of the Supreme Court in

[7] App. Exhibit 9, page143—"The judge's (Dooling), order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of *three* of the *four* ship operator defendants." However, respondent Dawson certified a payment of $149,610,000 in ODS funds during the period of violation (App. Ex. 5, p. 122a). Hearing examiner recommended ODS recovery of only $6,690,000, and this from "trade" defendants only, as he found no violation against "non-trades" (App. Ex. A, p. 19a).

Citizens to Preserve Overton Park, Inc. v. *Volpe, Secretary of Transportation*, decided March 2, 1971 (App. Ex. 13, pp. 183a-186a).

In 417 F.2d 972 (1969) the Court of Appeals granted a measure of discretion to the Administrator under APA 5 U.S.C. 701 *et seq.* by stating that the requirements for the recovery for past subsidies by the Government may be "less absolute" than to cease payment to current violators and followed this in its sequel decision 432 F.2d 137, 142 (1970) wherein it granted wider discretion by stating "nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers participation in the illegal action, should it find these matters relevant to its ultimate decision in *whether* to seek the recovery of subsidies paid during the violation and if so, how much and from whom" (see App. Ex. 11, p. 162a). As has been noted previously Maritime Subsidy Board's discretion was further broadened by implication in its *per curiam* decision in Docket 72-1753 of November 29, 1972.

"Overton" holds that under the Administrative Procedure Act the exception for action committed to agency discretion is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" (See App. Ex. 13, pp. 183a-184a).

Section 810 (46 U.S.C. 1227) states in pertinent part:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of the funds of the United States or any agency of the United States to any contractor who shall violate this section."

This language (to paraphrase *Overton*) is a plain and explicit bar to use of federal funds for all subsidy payments for at least the period of violation. At this point it should be noted that the Solicitor General in his brief in opposition to this petitioner's earlier Petition for Certiorari #388—1970 stated "the penalty created by Section 810 is *inflexible* as it bars all subsidy payments for at least the period of violation" (see App. Ex. B, p. 98a).

Petitioner agrees to this description and definition but disagrees with the Solicitor General's belief in the Board's discretion to invoke the remedy. In fairness, however, his brief in this case preceded the *Overton* decision by seven months, perhaps this view is no longer held. But even assuming *arguendo*, the availability of such discretion, by invoking sanctions against five violators in Conclusion #2 (Ex. A, pp. 86a-87a) certainly the *inflexibility* of the sanction demanded full recovery from these contractors in accordance with the definition no longer in conflict.

Petitioner believes, however, that as stated in Exhibit 3, p. 13a "continuing as a party and conforming" was no mere technicality and the remaining (non-trade) violators are ensnared by the fact that the language of the statute is clear as to them and there is law to apply.

Yet, despite the clarity of the statutory language the Second Circuit Court of Appeals created in 417 F.2d 972 (1969) a rationalization for avoiding the hard command of the statute which this Court in "*Overton*" has rejected. Judge Friendly's opinion was based on the premise that the general policy of the Merchant Marine Act 1936 to promote the welfare of the Merchant Marine conflicted with Section 810 and required reconciliation by allowing the Secretary of Commerce to engage in a wide range balancing of competing interests.*

But, as is stated in "*Overton*" no such wide ranging endeavor was intended by the statute. If Congress intended general policy factors to be on equal footing with the protection of an unsubsidized American business enterprise from destruction by subsidized American citizens acting in concert there would have been no need for Section 810 at all. This protection was paramount. As Judge Friendly fully recognized in the 1969 opinion "The primary concern manifested by the Congress in the legislative history of 46 U.S.C. 1227 was with the added burden which subsidies imposed on the competitive position of the victim." When these public monies are used to assist some citizens to hurt others in a manner inimicable to the interests of the United States the penalty for the evil at which Section 810 was aimed is explicit and mandatory.

> "Plainly there is law to apply and thus the exemption for action committed to agency discretion is inapplicable" (*Overton*", Ex. 13, p. 186a). The sanction of Section 810 should be invoked in full.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

Marshall P. Safir, *Pro Se*,
41 Flatbush Avenue,
Brooklyn, N. Y. 11217
(212) 858 - 2700

August 3, 1973

* Re Congressional intent see Docket A 17 (Ex. C, pp.122a-113a).

Appendix N—Opinion and Order of the Maritime subsidy Board, Dated April 16th, 1973

U.S. DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

MARITIME SUBSIDY BOARD

Docket No. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re Alleged Violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

Chairman, Robert J. Blackwell; Member, H. Clayton Cook, Jr.; Alternate Member, James S. Dawson, Jr.

Served Upon:

Marshall P. Safir, 41 Flatbush Avenue, Brooklyn, New York 11217 *pro se*.

James N. Jacobi, Esq., Kurrus & Jacobi, 2000 K Street, N. W., Washington, D. C. 20006 for American Export Lines, Inc.

J. Franklin Fort, Esq. and *Richard S. Salzman, Esq.*, Kominers, Fort, Schlefer & Boyer, 1401 K Street, N. W., Washington, D. C. 20005 for Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Incorporated.

John Williams, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005 for United States Lines, Inc.

Amy Scupi, Esq. and *Olga Boikess, Esq.*, Galland, Kharasch, Calkins & Brown, 1054 31st Street, N. W., Washington, D. C. 20007 for Bloomfield Steamship Co.

Robert T. Basseches, Esq., Shea & Gardner, 734 Fifteenth Street, N. W., Washington, D. C. 20005 and *Daniel H. Margolis, Esq.*, and *Murray J. Belman, Esq.*, 21 Dupont Circle, N. W., Washington, D. C. 10036 for American President Lines, Ltd., Prudential-Grace Lines, Inc. and Prudential Steamship Company, Inc.

Verne W. Vance, Esq. and *Andrew J. McElaney, Jr., Esq., Foley, Hoag & Eliot*, 10 Post Office Square, Boston, Massachusetts 02109 for Farrell Lines, Inc.

Michael J. McMorrow, Esq., Maritime Administration, Washington, D. C. 20235, as Public Counsel.

Docket No. S-243 is an investigative proceeding instituted by the Maritime Subsidy Board (Board) on October 24, 1969 to determine whether Section 810 of the Merchant Marine Act, 1936, as amended (Act),[1] had been violated by conduct of certain carrier members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) and the appropriate action that should be taken. Named as parties to the proceeding were petitioners Sapphire Steamship Company (Sapphire) and its individual owners, Marshall P. Safir and Arnold Weiss-

[1] 46 U.S.C. § 1227 (1970).

berger, who along with others,[2] had petitioned the Board in December 1967 for, among other things, recovery of any subsidies paid to such members of AGAFBO and others based on alleged violations of Section 810. Also named as parties were steamship operators which had been both members of AGAFBO and under operating-differential subsidy (ODS) contracts during all or a part of the period March 29, 1965 to March 1, 1966. Of these, the following had competed with Sapphire in the U.S. Atlantic and Gulf to U.K./Bordeaux/Hamburg trade (U.K./B-H range): American Export Isbrandtsen Lines, Inc. (presently American Export Lines, Inc. (AEL), Bloomfield Steamship Company (ceased being party to an ODS contract after December 31, 1965), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines, Incorporated (Mormac), and United States Lines, Inc. (USL). Those subsidized members which had not competed with Sapphire in such trade were: American President Lines, Ltd. (APL), Farrell Lines Incorporated (Farrell), Grace Lines, Inc. (presently Prudential-Grace Lines, Inc. (Grace), and Prudential Lines, Inc. (presently Prudential Steamship Company, Inc. (Prudential)). The

---

[2] These were two service organizations, Pioneer Overseas Services Corporation, a traffic management agency wholly owned by Mr. Safir, and Liberty-Pac International Corporation, a freight forwarded specializing in the overseas transportation of household goods wholly owned by Mr. Weissberger. They were extended the opportunity to file petition for leave to intervene in the proceeding but never made such filing. Of all the petitioners, only Mr. Safir made an appearance in the proceeding representing himself pro se and claiming to represent Sapphire. Sapphire was a U.S. non-subsidized steamship company owned equally by Mr. Safir and Mr. Weissberger which was declared bankrupt in May 1967. The court appointed trustee for Sapphire expressly disclaimed an interest in this proceeding.

first group are referred to collectively as the "trade respondents" while the latter collectively are referred to as "non-trade respondents."

The conduct questioned as violating Section 810 concerned the respondents acting in concert to reduce selected military cargo rates in the U.K./B-H range and holding them there during eleven months (March 29, 1965 to March 1, 1966) allegedly for the purpose of driving Sapphire from the U.K./B-H range. The Federal Maritime Commission (FMC) held in Docket 65-13 in 1967 that such rate reductions violated the Shipping Act, 1916, as amended:

> "AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest."[3]

Petitioners obtained a judicial order from the U.S. Court of Appeals for the Second Circuit as formulated by the U.S. District Court for the Eastern District of New York on remand that the above FMC finding was *res judicata* and under the doctrine of collateral estoppel constituted a finding of violation of Section 810 but for certain peripheral elements of that statute.[4] The court

---

[3] Docket No. 65-13, *Rates on Government Cargoes*, 11 F.M.C. 263, 287 (1967).

[4] *Safir* v. *Gibson*, 432 F.2d 137, 143 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970); *Order on Mandate of the U.S. Court of Appeals for the Second Circuit, Docket* 680643 (E.D.N.Y. 1970). The courts held that the FMC finding binding on Marad constituted a finding that such AGAFBO conduct respecting the rate reductions was "unjustly discriminatory or unfair" to Sapphire within the meaning of Section 810 of the Act.

order directed that the Board proceed with determining whether a violation had occurred, whether to recover subsidies during th period of violation, and, if so, how much and from whom. The Board in an order served December 19, 1970 directed the Chief Hearing Examiner Paul N. Pfeiffer, now Chief Administrative Law Judge, to proceed in such manner.

A public hearing was conducted from March to September 1971, principally in Washington, D.C. and a full record compiled. Chief Judge Pfeiffer served a Recommended Decision on April 24, 1972. He recommended that the trade respondents but not the non-trade respondents, had violated Section 810. After considering mitigating circumstances, he found that Lykes was the initiator of the violation with AEL, Mormac and USL somewhat reluctant followers, and Bloomfield's participation significantly less. He recommended as sanctions against the trade respondents that about $6,690,000 in ODS be recovered, that about $158,000 in unpaid construction-differential subsidy (CDS) on certain purchased ships be refunded, that the Department of Agriculture be notified of the opportunity to recover about $2,880,000 premium rates paid on carriage of cargoes under Public Law 480, that about 14,300 in advantageous charter hire to USL be refunded, that the privilege of Lykes depositing tax deferred earnings in ship replacement reserves be withheld for 337 days, and that the proceeding be referred to the Justice Department with regard to Lykes for such civil or criminal action as Justice may decide to pursue.

All parties except Public Counsel filed exceptions to the Recommended Decision and all parties filed subsequent answers. With the permission of the Board, certain trade respondents filed a further response to Public Counsel's answer. On October 10, 1972, the Board heard oral argument from all parties.

We have considered the record, the Recommended Decision, and the arguments of all parties. We find that all subsidized members of AGAFBO violated Section 810 but that recovery of operating subsidies is appropriate only from those who were in direct competition with Sapphire (the trade respondents). TThe issues for discussion concern the violation of Section 810, the Board's discretion to mitigate recoveries for past violations under Section 810, the mitigation factors advanced by respondents, and the appropriate recoveries giving regard to factors of mitigation.

DISCUSSION

I. *Violation of Section 810*

Section 810 of the Act provides in part as follows:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI or for any charterer of vessels under Title VII of this Act to continue as a party to or to conform to any agreement with another carrier by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

In compliance with the court order finding the previously discussed 19667 FMC finding as binding on Marad, the Board has established that "the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months [from

March 29, 1965 to March 1, 1966] was unjustly discriminatory or unfair to Sapphire." [5]

The precise condemned AGAFBO rates have not heretofore been expressly identified by the FMC in Docket 65-13 or by the courts in finding the FMC rate findings binding on Marad. The FMC decision referred to the March 29, 1965 AGAFBO rate reductions on the military household goods under Through Government Bill of Lading (TGBL) and on military household goods shipped free in and out (FIO—without loading or discharge costs to the ship) and to AGAFBO's notification to the Military Sea Transportation Service (MSTS) that these rates were made as a strictly temporary competitive measure and were not fair, reasonable, or compensatory. The FMC decision also stated that AGAFBO also "filed competitive rates on other goods in reaction to Sapphire competition."[6] The record in Docket 65-13 indicates that the Secretary of AGAFBO testified that all other AGAFBO rates filed in the U.K./B-H range "on a temporary basis to meet the Sapphire rates" were believed to be non-compensatory and that AGAFBO had informed MSTS in February 1966 that the AGAFBO temporary reduced rates to the U.K./B-H range "due to expire as of March 1, [1966]" were not fair, reasonable or compensatory.[7] The AGAFBO temporary military rate reductions in the U.K./B-H range, which expired on March 1, 1966, included those for

[5] Order Denying Petition for Ruling, Docket No. S-243, 11 S.R.R. 1144, 1148 (MSB 1970); *Safir v. Gibson*, 431 F.2d 137, 143 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970); *Order on Mandate of the U.S. Court of Appeals for the Second Circuit*, Docket 680643 (E.D.N.Y. 1970).

[6] 11 F.M.C. at 274-275.

[7] FMC Docket 65-13, Tr. 62-63 (S-243 Exhibit R-93); FMC Docket 65-13, Exhibit 485 (S-243 Exhibit PC-151).

TGBL-HHG, FIO-HHG, empty conex containers, general cargo, and vehicles of certain weight. We find that these are the rate reductions which occurred during the period March 29, 1965 to March 1966, which the FMC condemned as violating the Shipping Act, 1916, as amended, and which the court ordered not to be relitigated as to whether they were unjustly discriminatory or unfair to Sapphire under Section 810 of the Act.

As for the other elements necessary for a violation of Section 810, no exception was taken to the Chief Judge's finding that Sapphire was a U.S. citizen exclusively employing U.S. registered vessels and operating on established U.S. Trade Routes 5-7-8-9 and 11 during the eleven month period and that all respondents were ODS contractors during this period with Bloomfield's contract expiring on December 31, 1965. We adopt those findings. Exceptions were taken to his findings that Sapphire was a common carrier, that Sapphire operated in the U.S. Gulf on Trade Route 21 and that Section 810 extends to AGAFBO rates in the U.K./B-H range. Further issues are raised as to whether Section 810 applies to rate cutting and not just exclusion from a steamship conference, and whether Section 810 can only apply prospectively.

A. *Sapphire's Common Carrier Status and Operation on T.R. 21*

All parties agree that the test of a "common carrier by water" applicable to Section 810 is as defined by the Supreme Court in *Propeller Niagara* v. *Cordes*, 62 U.S. 7, 22 (1858):

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of

> such a kind as to be liable to extraordinary danger, as such as he is unaccustomed to convey." [8]

The Chief Judge found that Sapphire had common carrier status from U.S. Atlantic and Gulf ports to ports of the U.K./B-H range during the period of violation, relying on its holding out and its carriage of some commercial cargo over a substantial period of time and a large quantity of (TGBL-HHG) cargoes and privately-owned vehicles (POV) for the military, which he considered as properly commercial cargoes since they moved through normal commercial channels. Sapphire's limited Gulf service was found to be a common carrier service despite limited activity since it was "entirely conceivable" that absent the Lykes and Bloomfield reduced rates in concert with the other AGAFBO U.K./B-H range members, Sapphire "could have developed a viable operation to and from the Gulf." Public Counsel supports the Sapphire common carrier findings of the Chief Judge.

Trade respondents argue that Sapphire operated a military express service and not a common carrier service because it contradicted its holding out of a commercial service to the public by making it difficult for agents to book commercial cargoes, by placing an embargo on all commercial cargoes during a summer 1965 strike against other carriers, and by rejecting all but the most lucrative and convenient parcels of commercial cargoes offered by the shipping public and instead carrying almost exclusively military cargoes and negligible commercial cargoes. They

---

[8] The definition was cited in *Isbrandtsen Co., Inc.* v. *American Export Lines, Inc.*, 4 F.M.B. 772-782 (1956), as controlling on the meaning of "common carrier by water" under Section 810 of the Act.

emphasized that in its entire existence Sapphire never carried a cumulative total of a single shipload of commercial cargo "solicited at openly advertised tariffs." They also contend that TGBL-HHG and POV cargoes are military and not commercial cargoes because of the Government's interest therein and because all authorities recognize them as military cargoes. The Gulf trade respondents argue especially that Sapphire never established itself as a Gulf common carrier because it had minimal vessel contact with but one port in the Gulf, *de minimis* shipments of non-military cargoes in the Gulf, and in fact had rejected cargoes at ports other than New Orleans. The Gulf trade respondents further contend that even if Sapphire is considered a Gulf common carrier, that service could not have commenced until April 9, 1965, when Sapphire's tariff for its Gulf service became effective, and that the service ended in May 1965 with the termination of any Sapphire Gulf commercial coverage followed by cessation of advertisement of Gulf service in August 1965 and any Gulf operation in January 1966. Bloomfield adds that Section 810 in promoting the January 1966. Bloomfield adds that Section 810 in promoting the competitive interest of a victim requires the establishment of a competitive relationship between the subsidized carrier and the victim and that there was never any actual competition between it and Sapphire.

It is undisputed that Sapphire held itself out as a common carrier at least in the U.S. Atlantic/U.K./B-H range over the entire period of violation. It advertised its voyages, published by filing with the FMC its commercial and military cargo tariff rates, and solicited commercial and military cargoes by appointing agents in many of the U.S. and European ports it serviced. Sapphire did have a practice

of requiring its agents not to book commercial cargoes on Sapphire vessels without first getting clearance from the line's New York headquarters. The record shows, however, that such practice did not result in the rejection of any offered commercial cargo unless it was offered at less than tariff rates or deviated from an advertised sailing itinerary or involved a special call.[9] Sapphire also interrupted its solicitation efforts for two months during the U.S. maritime strike lasting from June to September 1965. Although the strike did not affect Sapphire vessels and competitor lines not struck were carrying commercial cargoes, it appeared the Sapphire management was attempting to protect against collateral union action. In any event the interlude in solicitation for a limited period does not indicate any desire by Sapphire not to hold itself out on a permanent basis as a common carrier by water.

It is also undisputed that Sapphire carried at least $262,957.55 of commercial cargoes during the period of

[9] Trade respondents cite only two instances of Sapphire rejecting offered commercial cargoes. The first instance involved a Dutch shipper offering tonnage of bagged grass seed on a regular basis to New York, Philadelphia, Norfolk, Baltimore and New Orleans if Sapphire could offer regular sailings and a better freight rate than the conference lines (Exhibit R-10). This is not a specific offering but a general one with unresolved questions of acceptable freight rate, numbers of calls to be made in any one sailing, understanding of "regular sailings," etc. Rejection of this offer on the present record does not rebut a common carrier finding. The second instance involved an offer of 700 tons of aluminum ingots from London to Baltimore and Philadelphia (Exhibit R-16). However, London was not an advertised call and the offer was rejected.

alleged violation,[10] that on all voyages on which commercial cargoes were carried multiple shippers were served, that it served, a regular and defined route, that it issued customary bills of lading for commercial carriage thereby assuming responsibility for safe carriage and that it was responsible for loading and unloading commercial cargoes. Section 810 does not require that the victim have a comparable common carrier service to the violators. It is well known that unsubsidized operators have immense problems in carrying purely commercial cargoes on a profitable basis in the U.S. foreign commerce. Since Sapphire held itself out to carry commercial cargoes and regularly carried some such cargoes over a substantial period of time over a set trade route, we are persuaded that Sapphire met the common carrier test as between U.S. Atlantic ports in the U.K.-B-H range during the period of alleged violation.[11] This conclusion is consistent with that of the FMC, which in Docket 65-13 found that Sapphire "operated a liner service" on the U.K./B-H range,[12] and with MSTS, which found the new company Sapphire was "a common

[10] During the period of alleged violation Sapphire received total revenues of $5,203,875.12. Commercial cargo was carried on 13 of 34 voyages up to and including the 28th voyage. This commercial cargo consisted of soybeans, lumber and general cargoes (Exhibit R-1 Rev.). The bulk soybean cargoes were carried according to normal commercial common carrier practice. Sapphire also carried commercial cargoes subsequent to the violation from May through September 1966.

[11] See, *e.g.*, Hutchinson, *Carriers* § 48 (3d ed. 1906) (common carrier if hold out as such, he is engaged in business of carrying goods for others, transportation is for hire and action against him lies for refusal without sufficient reason to carry proffered goods); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 61-65 (1965).

[12] 11 F.M.C. 263, 265 (1967).

carrier, with scheduled sailings on a designated trade route or routes, and with sufficient ships to support the schedule." [13]

We are not persuaded that TGBL-HHG and POV cargoes carried by Sapphire for the military can be considered as commercial cargoes for purposes of common carrier status. These cargoes are privately-owned and private shippers (not individual owners) contract with the ocean carriers for shipment. More importantly, however, these cargoes are shipped on a government bill of lading at government expense pursuant to a freight rate negotiated with the government and overall transportation arrangements are made by the government for its convenience. Further, we think it clear that a court would find these government cargoes subject to statutory preference for U.S.-flag for their ocean shipment as apparently even Mr. Safir recognized in testimony before the FMC.[14]

---

[13] Exhibit PC-158 (March 31, 1965); Tr. K-76. This finding was conditioned on Sapphire's booking at least one outbound and one homebound sailing without MSTS-booked cargo (Tr. K-77). Therefore, MSTS did not begin booking cargo with Sapphire until its second sailing from Baltimore on or about April 16, 1965. MSTS has explained the policy with respect to Sapphire as follows:

> "MSTS policy is not to induce the establishment of berth service from or to any particular port. Accordingly, cargo is not booked to or for any port until Sapphire has made one prior scheduled call at such port without inducement of military cargo." (Exhibit R-77-letter from MSTS to Office of Assistant Secretary of Defense, Installation & Logistics dated April 26, 1965.)

[14] Before the FMC, Mr. Safir and his attorney made he following remarks:

> "Q. Well how do you justify that [the fact that Sapphire military TGBL-HHG rate was lower than its in-

[Footnote continued on following page]

We also find that Sapphire maintained an operation on Trade Route 21 (Gulf/U.K.-B.H.) as a common carrier during a portion of the period of alleged violation. In so finding we do not reach the issue of whether Section 810 requires the victim to be a common carrier by water wherever it operates. For the Gulf/U.K./B-H range Sapphire filed with the FMC a commercial tariff effective April 9, 1965, hired soliciting agents, and advertised sailings. Through January 1966 Sapphire loaded cargo at New Orleans three times and called at New Orleans twice inbound, incident to taking delivery or making redelivery of chartered vessels. On each voyage it earned substantial revenues, total commercial freight revenues representing about 30% of total revenues for all five voyages.[15] There

---

> house rate] in view of the requirement of the 1904 Act that you charged the Government not more than you were charging commercial shippers? "A. [Mr. Safir] The question of whether the military household goods was a commercial ship[ment] or not is a debatable point.
>
> "Mr. Klausner: Mr. Hansen [Secretary of AGA-FBO], in fact, testified that it was a military movement." Exhibit R-2, pp. 2322)

Further, prior to Sapphire's entrance in the market these cargoes were includable in the MSTS military cargo allocation system (Tr. 1227-1228, K8-10).

In *United States Lines, Co.* v. *United States*, 223 F. Supp. 838, 844 (S.D.N.Y.), *aff'd* 324 F.2d 97 (2d Cir. 1963), the court held that POV cargoes shipped on private ocean carrier at Government expense under Government bill of lading came under 10 U.S.C. 2631. Public Counsel's distinction that the case involved a shipping order issued directly by the military to the carrier is simply not a material distinction in view of the overwhelming incident of military control and contact with the cargoes.

[15] According to trade respondent Lykes, total freight revenues of Sapphire for its Gulf operation amounted to $271,487 during its period of operation and the record shows that Sapphire carried $81,761.63 of commercial freight revenues of that total (Exhibit R-1, Analyses, 3, 5 (revised), 11, 23, 28).

can scarcely be any serious question that Sapphire operated on the trade route within the meaning of Section 810 since the statute requires merely operation, not substantial operation. Also, since Sapphire did hold out a commercial Gulf service and carried commercial cargoes on Trade Route 21 over a substantial period, it had common carrier status for such service. The exact time frame of this status is not geramine other than it was within, but less than, the alleged period of violation. The measure of liability of the Gulf trade respondents Bloomfield and Lykes is not governed by the period and extent of Sapphire's Gulf common carrier operation. It is governed by the duration and coverage of the military rate reductions first effected by AGAFBO on March 29, 1965. Lykes voted for such reductions; Bloomfield was eligible to vote on such reductions and in a couple of instances did vote for such reductions; and both respondents conformed to the filed AGAFBO tariffs' condemned rate reductions.

Finally, on the issue of common carrier status, Bloomfield seemingly maintains that Section 810 requires some competition between Sapphire and Bloomfield to establish a violation. While Section 810 may be designed "to promote the competitive interest of a victim by authorizing recovery of subsidies," [16] the Section does not require a competitive relationship between the violator and the victim to establish a violation. Congress intended to protect potential competition as vigrously as it intended to protect existing competition.

B. *Section 810 and Non-Trade Respondents*

The Chief Judge found that the trade respondent members of AGAFBO who actively participated in the

[16] *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).

conspiracy against Sapphire violated Section 810, but that the non-trade respondents who had not overtly participated did not violate Section 810. He distinguished a Board decision in Docket No. A-17, *American President Lines, Ltd., Japan/Saigon Freight Conference*, 6 S.R.R. 57 (1965), which held that the mere continued non-voting membership in an international steamship conference which excluded other U.S. flag operators violated Section 810. The Chief Judge stated that in the situation in Docket A-17 continued membership inured benefits to the conference member U.S. carrier but that there were no benefits to the non-trade respondents in AGAFBO's rate reductions.

The non-trade respondents emphasize the recommended finding that they had not violated Section 810, and Public Counsel emphasizes that no violations were found as to the limited subject of this proceeding; i.e., the condemned AGAFBO rate reductions. Mr. Safir argues that the decision in Docket No. A-17, in finding an 810 violation for being a party to or conforming to a discriminatory agreement, forecloses the Board from making any distinctions between the violators.

We recognize that the Second Circuit expressly noted that it "said nothing about who was responsible for these" condemned rate actions [17] and that the matter is open for our decision. We are persuaded that the non-trade respondents as members of AGAFBO, and therefore parties to the AGAFBO rate tariffs, have violated Section 810.

The AGAFBO agreement, FMC Agreement No. 8086, provided in part as follows:

[17] *Safir* v. *Gibson*, 432 F.2d 137, 146 (1970). See also Order Denying Petition for Ruling, 11 S.R.R. 1144, 146 (1970).

"Meetings shall be called by the Secretary from time to time by mailing a notice to each party containing a docket of the matters to be considered . . . Except as otherwise provided for, all actions within the scope of this agreement shall be upon a vote of 75% of those parties present and voting thereon at a meeting. However, as to any matter having application only to a specific region, such as the Bordeaux-Hamburg range, the Persian Gulf, the Far East, etc. only those parties having a shipping contract or rate agreement with MSTS covering such area or regularly serving a non-contract area shall be entitled to vote thereon. Any of the parties entitled to vote on such matter shall hav the right to have the matter submitted to a full membership vote with action thereon to be taken by 85% of those parties present and voting thereon. *All actions taken pursuant to this agreement shall be binding on all parties hereto.*" (Emphasis added.)

With regard to the AGAFBO rates in the U.K./B-H range the option of area members to require an area rate action to the full membership was never exercised. None of the non-trade respondents voted on any of the condemned AGAFBO rate reductions. It is unclear as to the extent, if any, of their participation in any discussions on the merits of such rate reductions.[18] Once the

[18] For instance, the initial condemned rate reduction stemmed from an AGAFBO meeting of March 9, 1965. The minutes for that meeting reported:

"The question was raised as to whether only the Bordeaux-Hamburg, U.K. lines should vote since the matter involved rates for those areas or whether all member lines should

[Footnote continued on following page]

vote was taken by the U.K./B-H members of AGAFBO it became binding on all members of AGAFBO with a potential fine by the organization of $10,000 for violating such action should the non-trade respondent commence a service in the range and not abide by the AGAFBO rate.

The organization AGAFBO and not the individual members filed the condemned rate tariffs with the FMC although the carrier servicing the trade, for which the rates were applicable, were identified. The FMC found that the "AGAFBO rates", reduced to an admittedly non-compensatory and unreasonable level in an attempt to unfairly compete with Sapphire, violated Section 18(b)(5) of the 1916 Shipping Act and that "AGAFBO" by reducing such rates violated Section 15 of the 1916 Shipping Act. From such findings the Second Circuit found that "AGAFBO" carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Although it is clear the entity AGAFBO was addressed by the FMC and the courts, the precise nature of the unlawful act committed by AGAFBO under Section 810 was not specified.

vote since there was a question of policy involved. It was agreed that since all members participated fully in the discussion and agreed on the basic policy involved that only the Bordeaux-Hamburg lines would vote."

Subsidized operators shown , esent at the meeting were AEL, APL, Lykes, Mermac, Prudential and USL. The non-trade respondents maintain the "policy involved" was whether the non-U.K./B-H AGAFBO members should vote. We merely note that such explanation requires a peculiar reading of the minutes, as "The question was raised as to whether only the Bordeaux-Hamburg, U.K. lines should vote . . . since there was a question of whether only they should vote."

See also Exhibits PC-108, 110, 112.

Section 810 decrees as unlawful a subsidized operator acting in concert (1) "to continue as a party to or to conform to any agreement," or (ii) "to engage in any practice . . . which is unjustly discriminatory or unfair. . . ." We find that the Section 810 prohibited activity is (1) continuing as a party to or conforming to the AGAFBO military TGBL-HHG cargo rate tariff effective March 29, 1965, and similar rate tariff amendments on the U.K./B-H range admitted to be non-compensatory and unreasonable, or (2) engaging in the "practice" of filing such tariff amendments. Non-trade respondents as well as trade respondents were members of AGAFBO, bound by all its actions,[19] and, therefore, a party to the AGAFBO rate reduction tariffs and amendments which were unjustly discriminatory and unfair. They therefore have technically violated Section 810.

The decision in Docket A-17, finding that an American-flag operator continuing as a non-voting member of a conference excluding other American-flag operators would violate Section 810, cannot be fairly distinguished. It was noted in that decision that Section 810 "makes no mention of voting, nor does it divide membership into types and classes." We add that Section 810 also fails to distinguish between conferences governing one trade area

[19] It is recognized that Mr. Hansen, the Secretary of AGAFBO, testified that the provisions of the AGAFBO agreement that "All actions taken pursuant to this agreement shall be binding on all parties" hereto had never been interpreted (Tr. 686-687). However, we consider the provision clearly encompasses binding all AGAFBO parties to the votes, and implementing actions, on military cargo rates in specific regions. Such provisions, of course, would control an AGAFBO member who operated outside of the region on which the rate was established but who subsequently desired to operate in such region.

and conferences governing multiple trade areas as AGAFBO did. While the non-trade respondents received no direct benefits from the condemned rate reductions since they did not operate in the U.K./B-H range, it is clear that indirectly most of them saw the matter possibly spreading in terms of rate reductions and competition to their own areas[20] and achieved benefits in that such rate reductions did not spread to other areas. It is not an adequate rebuttal by either non-trade respondents or trade respondents that a finding of violation of Section 810 is precluded because such respondents would have had to resign to avoid violating Section 810, thereby breaking up the AGAFBO conference which allegedly the Government desired to continue. American subsidized operators cannot be parties to unfair and unjustly discriminatory agreements against another U.S.-flag operator covered by the provisions of Section 810 without violating that Section.

C. *Section 810, Rate Activity and Prospective Application*

Trade respondents argue that the Second Circuit in the *Safir* v. *Gibson* decisions did not foreclose a finding that Section 810 does not apply to rate activity. The Chief Judge, supported by Public Counsel, found that Section 810 applied not only to exclusion of an American-flag carrier from conference membership but also to conference predatory rate practices against an American-flag carrier. It is sufficient to observe that the Second Circuit stated that "the fixing of unjustly discriminatory or unfair rates aimed at an American-flag carrier pur-

[20] Tr. 979-81, 986, 993 (APL); Tr. 1025, 1028 (Prudential); Tr. 1125 (Grace).

suant to a conference agreement would constitute a 'practice' [unlawful under Section 810]." [21] Further, the premise of the court's directing the Board "not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them for eleven months was unjustly discriminatory or unfair to Sapphire" was that Section 810 applies to rate activity.

In a similar manner the trade respondents' contention that the Second Circuit has not foreclosed finding that Section 810 operates prospectively only is without any basis. The Second Circuit stated "that § 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past. . . ." [22] Further, we would not be under mandate to reach a decision on recovery for past violations under Section 810 if the Second Circuit had not found Section 810 applies to recoveries for such past violations.

In summary, we find that all respondents were ODS contractors from March 29, 1965 to March 1, 1966, except Bloomfield which was an ODS contractor until December 31, 1965, and that all respondents in concert were parties to or engaged in practices unjustly discriminatory or unfair to Sapphire during such time period. We also find that Sapphire was a U.S. citizen operating as a common carrier by water and exclusively employing U.S. registered ships on Trade Routes 5-7-8-9 and 11 (Atlan-

[21] *Safir* v. *Gibson*, 432 F.2d 137, 142 (1970), *cert. denied*, 400 U.S. 972 (1970).

[22] *Safir* v. *Gibson*, 417 F.2d 972, 978 (1969). See discussion of this finding *infra* on consideration of Mr. Safir's arguments that recoveries for violations of Section 810 are made to the victim.

tic/U.K./B-H trade) during such time period and on Trade Route 21 (Gulf/U.K./B-H trade) within that time period. Further, we find that Section 810 provides for recovery of payments and subsidies for past violations and applies to rate activity as well as to exclusion of a U.S. carrier from a conference. Therefore, we find that all respondents violated Section 810 from March 29, 1965 to March 1, 1966, except that respondent Bloomfield's violation extended only to and including December 31, 1965, and further that on the same basis all respondents breached their ODS agreements with the Government which set forth pertinent provisions of Section 810.

II. *Board Discretion in Recovering Past Payments.*

The Chief Judge found that the Second Circuit, the District Court and the Board have all recognized the Board's discretion on "whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." Apparently, only Mr. Safir excepts to such finding. Mr. Safir argues that it is irrelevant to investigate the nature and extent of the individual carrier's participation in the illegal action because the decision in Docket A-17, found that continued membership in a conference excluding American-flag carriers violates Section 810.

The Second Circuit did not make any definite finding regarding any discretion in connection with recovery of payments for past violations. At most the court found that while there may be "some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not un-

limited." [23] We agree with the Chief Judge that Congress intended discretion to be exercised in imposing any such recovery. Congress had two objectives in permitting, under Section 810, recovery of payments or subsidies made in the past: primarily, removal of the added burden that U.S. payments to the violators imposed on the competitive opportunities of the victim and, secondarily, imposing a certain deterrent effect against future violations.[24] However, conflicting statutory purposes are presented. On the one hand, the Act requires promotion of the U.S. merchant marine through subsidies and other means, and, on the other hand, Section 810 requires withdrawal of those subsidies when they are used to the detriment of a U.S. operator within our merchant marine. Certainly, Congress intended both purposes of the Act to be carried out. Therefore, it is apparent that Congress intended considerable discretion in weighing the recoveries to be effected for past discontinued violations so as not to infringe seriously upon the promotional purpose of the Act. Further since Section 810 is at least partially penal in character in requiring retroactive recovery of

[23] *Ibid.* It is also noteworthy that the Second Circuit, in response to concerns of non-trade respondents, expressly stated:

> "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carrier's participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom."

Safir v. *Bibson*, "432 F.2d 137, 145 n.2, 146 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970).

[24] See discussion of the Congressional intent in Section 810 as to recoveries for past violations at page 56-60 *infra*.

subsidy for past violations, mitigating circumstances can be considered in determining the sanctions to be imposed.[25] The decision in Docket A-17 considered only the liability under Section 810 for ongoing violations. It did not consider recoveries for past violations or the discretion, if any, of the amounts to be recovered with respect to each individual violator. Accordingly, we consider respondents' arguments for mitigation of recoveries.

III. *Mitigation Factors*

Mitigation factors pertain both to non-trade respondents and trade respondents. The former have the same arguments for mitigation as for a finding of their not having violated the statute. The latter advance several mitigation factors which they claim require that no amounts be recovered from any trade respondent.

A. *Non-trade Respondents*

Although the non-trade respondents technically violated Section 810, we are not persuaded that any sanctions are warranted. As stated hereinabove, the non-trade respondents did not, and could not under the AGA-FBO agreement as implemented, vote on any of the illegal rate reductions. None of these respondents had any competitive service with Sapphire during the violation and therefore carried no cargo at the reduced AGAFBO rates. Their only connection with the condemned rate actions was as a technical party to the AGAFBO condemned rate tariffs due to their membership in AGAFBO.

Such technical connection, while conclusive of their liability for violating Section 810, provides no basis under

[25] *E.g., United States* v. *H.M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388-89 (S.D.N.Y. 1966).

the circumstances for imposing any sanctions for such violation.

B. *Trade Respondents*

Trade respondents argue that some seven factors warrant mitigation of all recoveries for violating Section 810: (i) the military (Department of Defense—DOD, including Military Sea Transportation Service — MSTS) pressured AGAFBO to reduce rates to Sapphire's level; (ii) the Government is estopped by its actions from penalizing respondents for making those reductions; (iii) the reductions were made on advice of counsel; (iv) the reductions did not injure Sapphire; (v) AGAFBO's van line policy towards associated companies of Sapphire was justified; (vi) the reductions involved no predatory intent toward Sapphire; and (vii) individual respondents had special circumstances regarding the rate reductions meriting mitigation.

(1) *Military Pressure for Lower AGAFBO Rates*

The Chief Judge found that the military exerted pressure to get lower AGAFBO rates, but that the military also believed that AGAFBO's original rates were too high for the services rendered and that AGAFBO members rates for commercial cargoes were disparately lower than for similar cargoes shipped under military auspices. He also found that the military made no effort to obtain reductions below compensatory rate levels or to obtain reductions only to match the Sapphire rates but rather that the military sought rate reductions across the board.

Trade respondents argue "that in actual facts MSTS did not care one whit whether the rates offered by the AGAFBO carriers were compensatory or not" and that MSTS and DOD did seek AGAFBO rate reductions on a

discriminatory basis to the U.K./B-H range. They particularly argue that the military sought lower AGAFBO rates by means of reducing for Sapphire certain requirements usually imposed upon carriers of military cargoes. Public Counsel argues that the emphasis by the trade respondents on other causes for the rate reductions, escepially the withdrawal of Waterman Steamship Corporation (Waterman) from AGAFBO and the protection of van line customers, serves to negate the contention that the rates were dropped because of military pressure.

The pertinent issue presented by the plea of trade respondents for mitigation because of military pressure is whether they made the reductions in response to such pressure for lower rates or for other reasons. We find that at best this pressure was a relatively minor consideration in the trade respondents' rate reductions.

The background of the military pressure cited by trade respondents involved compliance with the McCumber Amendment of 1904, 10 U.S.C. § 2631, which required a U.S.-flag ocean carrier to charge the Government no more for carriage of goods than it charged commercially. There had been severe official criticism, at least since 1963, that the military was being charged more in the North Atlantic trade than was being charged commercial shippers for the same cargoes.[26] The military itself had undertaken

[26] On March 23, 1963, a federal district court issued a decision highly critical of the failure of MSTS officials to enforce the McCumber Amendment with respect to POV rates for the military in 1957-1960 in the North Atlantic trade, *United States Lines Co.* v. *United States*, 223 F. Supp. 838 (S.D.N.Y. 1963). *aff'd*, 324 F.2d 87 (2d Cir. 1964). On December 29, 1964, the Joint Economic Committee of Congress chaired by Senator Douglas issued a report also critical of MSTS enforcement of the McCumber Amendment. Further, DOD and GAO had expressed similar criticism (Exhibit R-49).

studies which supported this criticism.[27] The situation on the North Atlantic, to which many of these criticisms were particularly directed, apparently was precipitated by a commercial rate war which drove down the commercial rates while the military cargo rates under military shipping contracts were not similarly reduced. In the course of coping with this problem the military was presented with a proposal by Liberty-Par International Corp. (Liberty-Pac).[28] In 1964 Liberty-Pac proposed to the Assistant Secretary of Defense for Installations and Logistics that military household goods be moved by TGBL in steel containers at a $3 per hundred weight rate reduction to Germany, provided, however, that Liberty-Pac be released from the MSTS allocation system [29] and that it be given the right to charter ships if berth operations (AGAFBO members) refused to negotiate reduced ocean freight rates for such cargo. The relevant circumstances of the military pressures cited by the trade respondents, which concern the interreaction of this problem of rate com-

[27] *E.g.*, Exhibit R-49, attachment G.

[28] The relationship of Liberty-Pac to Mr. Safir and Sapphire is explained in note 2 *supra*. Liberty-Pac was a household goods van line carrier. Such carriers contracted with the military for the combined land and sea movement of TGBL-HHG, incorporating in the combined rates quoted to the military and ocean freight rate. Prior to acceptance of the Liberty-Pac proposal, the only available U.S. ocean carriers were members of AGAFBO who negotiated the TGBL-HHG rate directly with MSTS.

[29] Under the military "allocation system", MSTS alloted military cargoes among ocean carriers serving a route on the basis of the number of sailings each carrier offered on the particular route. Thus ,a carrier offering four of twenty sailings on a route would be eligible for 20 percent of the military cargo carried on that route. Prior to acceptance of the Liberty-Pac proposal TGBL-HHG were included in the allocation system.

parability and consideration of the Liberty-Pac proposal, are as follows:

1. On December 5, 1964, DOD indicated it found the terms of the Liberty-Pac proposal "attractive" but it insisted that household goods of DOD personnel had to move on U.S.-flag vessels in berth service and that the household goods moving industry be given the same opportunity. About two days later MSTS enclosed pertinent correspondence on the Liberty-Pac proposal to AGAFBO and solicited its comments. AGAFBO responded flatly that it had no present intention of modifying its rates for TGBL-HHG and requested that DOD require of anyone making such a proposal to evidence its financial ability to perform. A few days later a DOD official called AGAFBO asking what steps it might take to compete with Liberty-Pac should that corporation be given authority by DOD to operate chartered ships in common carrier berth service. Evidently, AGAFBO refused to change its position, and on December 29, 1964, DOD accepted the entire Liberty-Pac proposal with the understanding that all carriers in the household goods moving industry would be given the opportunity to make similar proposals.

2. According to the Secretary of AGAFBO, a key official at DOD on January 21, 1965, expressed surprise that AGAFBO had not taken steps to make its rates competitive with those of Liberty-Pac. On that date the same official issued a statement that any offer embodying similar rate reductions to that of Liberty-Pac's would be accepted (steel containers were not mentioned), but MSTS did not require exemption of household goods from the allocation system if another carrier proposed competitive rates and desired to remain within the allocation system. Further, it was stated that the scope of such exemption

was limited to service to German ports since Liberty-Pac's offer was so limited. Trade respondents claim this statement increased pressure on them to match the Liberty-Pac rate reductions.

3. On February 2-3, 1965, MSTS, in meeting with AGAFBO, sought an immediate goal of rate reductions across the board. MSTS hinted of certain alternatives which were understood to include use of Liberty-Pac and refusal to certify the reasonableness of the AGAFBO rates to the Renegotiation Board.[30] At the meeting there was also a study presented of a comparison of commercial and military rates on the U.K./B-H range which showed in some instances that commercial rates were lower than rates for "comparable" military cargo.

4. On February 3, 1965, Liberty-Pac expanded its proposal to include service to the United Kingdom and France at a total reduction in rate of $5 per hundred weight. Apparently, thereafter Liberty-Pac realized or learned that the military had taken *all* household goods out of the allocation system and had dropped the requirement for steel containers. Mr. Safir testified that these steps by the military had a severe adverse effect upon Liberty-Pac's proposal and that it had to cancel the steel

[30] The Renegotiation Board under the Renegotiation Act, 50 U.S.C. App. § 1121 *et seq.*, guarded against contractors reaping excess profits from government contracts. Prior to 1965, MSTS had rather routinely certified to the Board that no basis was known to suspect that AGAFBO carriers were enjoying excess profits since MSTS had negotiated such rates with AGAFBO. Based upon lower commercial rate patterns in 1964 and 1965. MSTS began to suspect the AGAFBO military rates were too high and that GBL shipments were a favorable alternative to FIO shipments (Tr. K-37-40; Exhibit R-55).

container purchase contract. Hence, Liberty-Pac's reduction became more dependent on lower ocean freight rates.[31] The three vessels that had been chartered were retained, however, and a steamship company (the Sapphire Steamship Company) was formed on February 12, 1965, to operate them.

5. On February 11, 1965, certain van line customers sought rate reductions from AGAFBO so that they could compete with Liberty-Pac. They asserted that Liberty-Pac's rate was predicated upon its ability to obtain reduced water transportation costs. AGAFBO was not immediately moved by its customers' requests.

6. Meanwhile on February 9, 1965, MSTS instructed its field offices to prepare to withdraw certain cargoes from carriage under shipping contracts where usbstantial shipments by GBL (as opposed to FIO) would be cheaper. This step was implemented on March 2, 1965. Also, on February 9, MSTS instructed its field offices to accumulate cargoes for shipments on the U.K./B-H range under the volume discount provisions of shipping contracts. MSTS considered it was being overcharged for substantial volumes on the North Atlantic route. On February 15, MSTS requested of AGAFBO cost data necessary for a report to the Renegotiation Board. On February 19, MSTS requested AGAFBO's best offer for a downward revision in the general military cargo rate for the U.K./B-H range.

[31] It was estimated that originally Librety-PPac's proposed $5 per hundred weight reduction was derived from about $2 attributable to efficiency of steel containers and the traffic pattern that would be developed, about $1 from more favorable steamship rates due to use of steel containers and about $2 from economics of volume business generated from service to the U.K., France and Germany (Tr. 1249-51; Exhibit R-42).

7. On March 2, 4, and 9, 1965, AGAFBO members deliberated over whether to reduce its TGBL-HHG and FIO-HHG rates and on the last date voted to reduce the rates from 81¢ to 52.5¢ per cubic feet for TGBL-HHG and from 58.5¢ to 23¢ per cubic foot for FIO-HHG on the Atlantic U.K./B-H range on a 30 day temporary basis to revert to previous levels if not extended. The TGBL-HHG reduced rate was calculated to be equivalent to the Liberty-Pac proposed rate reduction and was made just prior to the March 19 deadline for van line inland carriers to meet the Liberty-Pac proposal. Two days later Sapphire announced a 45.5¢ per cubic foot rate for TGBL-HHG in the Atlantic-U.K./B-H range (as compared to the AGAFBO's voted-upon-rate of 52.5¢). At a special meeting on March 16, 1965, the AGAFBO carriers operating on that range voted on the same basis as before to meet the 45.5¢ rate. Such AGAFBO rate was filed with the FMC.

8. On March 29, 1965, AGAFBO members explained the rate reductions to MSTS, citing in detail the circumstances of the Liberty-Pac proposal and concluding:

> "As a matter of record we do not believe that either rate [Sapphire's or AGAFBO's] is fair, reasonable or compensatory and the action is taken in the interests of both the inland carriers and ocean carriers strictly as a temporary competitive action to give time for a realistic determination as to the competition which we must face and consideration of a proper action for the future.
>
> • • • • •
>
> "As a final statement for the record we wish to repeat verbal statements made in discussions on this matter that at this time instead of a rate reduction there should logically be a rate increase to compensate for the increased cargo handling costs occasioned by the recently concluded I.L.A. agreements." [32]

9. After this statement and prior to May 18, 1965, MSTS made use of all the favorable Sapphire dates which included a 40¢ per cubic foot rate for general miiltary cargo as compared to the AGAFBO rate at 54.5¢ per cubic foot for such cargo. AGAFBO used the time to challenge with MSTS whether Sapphire had complied with MSTS regulations. MSTS replied that Sapphire had complied.[33]

10. Also during this period trade respondents point out that on March 30, 1965, MSTS wrote the Renegotiation Board refusing to extend to AGAFBO an exemption under the Renegotiation Act, and that on May 13, 1965, MSTS met with AGAFBO and indicated the military de-

---

[32] Exhibit PC-4.

[33] Trade respondents also argue that MSTS went to unusual efforts to support the Sapphire operation in order to force down the AGAFABO rates. However, the record only shows that Sapphire was treated the same as any TGBL carrier would have been at that time. For instance, MSTS permitted Sapphire to qualify for financial fitness and as a berth operator after one voyage from a port, but only as a TGBL carrier; it retained its traditional requirement that three qualifying voyages were necessary for Sapphire to be eligible to receive a shipping contract (Exhibit PC-19). Further, the military accorded Sapphire a preference on the carriage of military cargo when its rates were lower or were quoted for a longer time (6 mos. vs. 30 days) in the same manner as AGAFBO carriers were treated when they offered rate advantages to the military (Exhibit PC-11).

sired to negotiate a 13.6% decrease in North Atlantic general cargo rates.[34]

11. At an AGAFBO meeting on May 18, 1965, Waterman's representative was asked to leave the meeting in view of Waterman's announced decision to withdraw from AGAFBO effective May 23 and to establish rates equivalent to Sapphire's rates. The U.K./B-H range members then voted, on a temporary basis, to match the Sapphire general military cargo rates.[35]

These events show that AGAFBO consistently rebuffed, for at least two years, all attempts by the military to induce rate reductions and that when AGAFBO reduced its rates the reductions initially were not across the board,

[34] Exhibit R-58. In this connection it should be noted that MSTS did not pressure AGAFBO to reduce its rates to noncompensatory levels. MSTS' policy was that it would not knowingly accept rates which were not compensatory (Exhibit R-65(2)). While AGAFBO asserted its reduced rates were unfair, unreasonable and noncompensatory, it submitted no proof of this claim. MSTS had made some review of the Sapphire rates (Tr. K-55-58, 63-64) and on that basis considered them reasonable. It did not, however, undertake a full scale analysis of the compensatory nature of the Sapphire rates because it lacked sufficient data (Tr. K-55, 58) and the issue of what constitutes compensatory rates had always been highly controversial and the ultimate responsibility of the FMC (Tr. K-69). It had, however, undertaken rate comparability studies which suggested the original AGAFBO rates were considerably more costly than commercial rates, see note 26 *supra*.

[35] Trade respondents also cite other indicia of military intentions gleaned from documents discovered in this proceeding. The relevant point in time, though, is the period of violation. At that time AGAFBO could only have responded to the communication it actually received from the military. Hence, the recently discovered indicia was not referred to herein.

as the military sought, but strictly limited on a temporary basis to the TGBL-HHG cargoes which Sapphire principally planned to carry. AGAFBO even hastily convened a meeting to match Sapphire's rates exactly. In explanation of the initial rate reductions AGAFBO did not indicate to the military that the action was in acquiescence to the military's position; instead it cited other grounds. When AGAFBO reduced its general cargo rates it was to match Sapphire's rates, which were below the level of reductions sought by the military. Testimony of shipping executives of trade respondents confirm that military pressure was a minor reason for the trade reductions and that other factors were more critical.[36] Finally, if the

[36] An executive for AEL testified that AEL voted for rate reductions on and after May 18, 1965, in order to keep AGAFBO together, in view of the pending, and then actual, resignation of Waterman (Tr. 1416-17, 1422-23, 1435). An executive for Bloomfield testified that it agreed to the rate reductions because the majority of U.K./B-H range AGAFBO members were for the reductions (Tr. 1327-28, 1364-65). An executive for Lykes testified that Lykes voted for the reductions to keep AGAFBO intact and to avoid facing Waterman at its reduced rates (Tr. 840-41, 900-01). An executive for Mormac testified that Mormac voted for the rate reduction to forestall Waterman's resignation from AGAFBO and to continue to carry the cargo (Tr. 1089-90, 1100-01, 1105-06). An executive of USL explained its reasons for voting were to protect established van line customers, to continue to carry the cargo, to avoid the loss of competitive posture to Waterman, to keep others from following Waterman, and to retain benefits of AGAFBO such as favorable credit arrangements (Tr. 914-15, 918-19, 955-56, 964). An executive for American Union Transport, an unsubsidized operator which attended most of these meetings, even testified, in response to an inquiry whether the military exerted pressure for the U.K./B-H range AGAFBO members to reduce their rates to those of Liberty-Pac, that: "It was not my recollection that the Department exerted any pressure of any kind." He did testify that the military was "plain and simple interested in lower rates." (Tr. 1160-61).

trade respondents were bowing to unrelenting pressure from the military for rate reductions, it is a curious mystery why AGAFBO members let its condemned reduced rates revert to former higher levels in the very teeth of such pressure.

(2) *Argument that Government is Estopped*

The Chief Judge gave no credence to the trade respondents' argument that MarAd is estopped from enforcing Section 810 because the violators were importuned by the military to lower military freight rates. He found that Section 810 require MarAd to insure that subsidies paid to meet foreign competition are not improperly used to destroy U.S.-flag carriers.

Trade respondents argue that the Government was responsible for the AGAFBO decision to reduce its rates and having rceived the benefits of that reduction is legally estopped from recovering subsidies. They claim that whenever the doctrine of estoppel is involved it overrides a Government obligation, such as under Section 810. They urge that if the principle of estoppel is not accepted by the Board, the Board takes into account as mitigation the benefits the Government did receive from the rate reductions, allegedly "in the neighborhood of $14 million."

As discussed hereinabove, the Government was not primarily or essentially responsible for the AGAFBO decision to reduce its rates. The trade respondents reduced their rate primarily for other reasons. Therefore, we need not and do not make any finding on the issue whether estoppel could be invoked in this instance if the Government had been responsible for the AGAFBO condemned rate reductions. Further, we cannot take into account, as mitigation, the alleged benefits the Government re-

ceived from the condemned rate reductions because it has not been established that but for those rate reductions the United States would not have had Sapphire as another commercial operator offering competitive compensatory rates at levels returning equal or greater benefits to the Government than claimed by trade respondents.

(3) *Advice o fCounsel*

The Chief Judge carefully considered the trade respondents' argument that the AGAFBO rate reductions were made in good faith on the advice of counsel, that the advice was entirely reasonable, and that such circumstances alone required no imposition of any recoveries. The Chief Judge found that AGAFBO members had consulted the organization's attorney on the rate reductions, but also that the AGAFBO carriers should have known that their concerted actions, taken with predatory intent, were illegal. He found that there were legal alternatives available that would have enabled fair competition with Sapphire. He also found that the attorney's advice was premised on an unestablished fact, that the AGAFBO reduced costs reflected out-of-pocket costs, and that such advice was erroneous. Further, the Chief Judge found that AGAFBO members used the attorney as a "scapegoat" rather than having actually relied on him.

Trade respondents dispute every one of the Chief Judge's findings. Generally they argue that he failed to distinguish between a mitigating circumstance and a legal defense and that the attorney's advice was reasonably relied upon by AGAFBO. They add the charge that the Board's refusal to permit the attorney to testify because of the invoked attorney-client privilege is prejudicial error to the extent it prevents the Board from tak-

ing into account trade respondents' good faith in acting on advice of counsel.

We are persuaded that trade respondents have presented circumstances on this subject which warrant some, but not total, mitigation of recoveries under Section 810 for their rate reductions. The record shows that prior to the initial rate reductions on March 9, 1965, AGAFBO members had directed that its attorney be consulted and that said attorney thereafter added the statement in the agreed-upon-motion of March 9, 1965, that AGAFBO did "not feel the rate is fair, reasonable or compensatory." It also appears from the statements of counsel for trade respondents that the actual advice was that as long as the reduced rates covered out-of-pocket costs, the reductions were not unlawful.[37] The circumstances of the conveyance of this advice to AGAFBO members and the manner in which they relied upon such advice was not developed on the record by the trade respondents despite an opportunity for further testimony for that purpose, suggested by the Chief Judge and the Board.

Testimony of executives of most of the trade respondents indicate that advice of counsel was of background

[37] In our view it is immaterial for present purposes whether the attorney's advice was correct because the thrust of the argument is that there was legal advice and it was relied upon, even if erroneous. The FMC and Second Circuit have found the advice was wrong with respect to violation of the 1916 Shipping Act and Section 810 of the 1936 Act regarding unfair and discriminatory action to U.S.-flag common carriers by water. We are under court order not to relitigate that issue and we consider the order just as conclusive against a collateral attack as a direct attack.

importance in making the condemned rate reductions.[38] Only an executive for AEL testifid that his company relied on the AGAFBO attorney's advice in taking such actions.[39] However, this testimony is somewhat puzzling. The same executive testified that AGAFBO's attorney was responsible for the phrase that AGAFBO did "not feel the rate is fair, reasonable or compensatory" in the AGAFBO March 9, 1965 rate reduction but AEL's present position is that the rate reductions were compensatory.

In summary, it appears that most of the trade respondents considered that the rate reductions were being made with the approval of AGAFBO's attorney but it is not apparent that such advice was critical to their decision to reduce the rates.

(4) *Injury to Sapphire*

The FMC in Docket 65-13 found that AGAFBO rate reductions "did have a disastrous effect on Sapphire,"[40]

[38] An executive for Lykes testified that "some counsel" tacked on the language that the AGAFBO rate reduction voted on March 9, 1965, was not fair, reasonable or compensatory (Tr. 837). An executive of USL testified that his company had voted to refer the matter of whether the Liberty-Pac/Sapphire household goods rate might be enjoined to AGAFBO's attorney (Tr. 913). An executive of Mormac testified that AGAFBO was getting legal advice "with respect to all these matters." (Tr. 1101). An executive of Bloomfield testified his company had not consulted legal counsel before joining in the condemned rate reductions and that it had not relied on counsel in taking such actions (Tr. 1361, 1363).

[39] Tr. 1419, 1436.

[40] 11 F.M.C. at 283. The FMC elaborated that "AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operations." *Ibid.*

The Chief Judge found the trade respondents' arguments irrelevant that such finding was erroneous, and that Sapphire was not so injured. In the Chief Judge's view, Section 810 proscribes unfair and unjustly discriminatory action taken with the intent to drive a U.S.-flag competitor from a trade. He did not consider that a violation of 810 required the attempt to be successful. Public Counsel supports that position and adds that the FMC conclusion that the rate reductions adversely affected Sapphire cannot be inquired into, by order of the court and the Board.

Trade respondents riterate their arguments that the rate reductions in no way injured Sapphire and that the FMC finding of disastrous effect on Sapphire was not supported by evidence. They add that Mr. Safir, in testifying before the FMC in December 1965 of the success of Sapphire, admitted that AGAFBO had not injured Sapphire.

Aside from the problem of attacking findings by the FMC, we fail to perceive the relevance in this proceeding, even as a factor of mitigation, of the extent of injury caused to Sapphire by AGAFBO. This proceeding is not concerned with the injury to Sapphire (as is the provision for treble damage under a separate part of Section 810). Rather, this proceeding concerns policies regarding recoveries from respondents for actions intending injury to Sapphire and affecting the welfare of the U. S. merchant marine. As for these policies, it makes no difference whether the proscribed action caused injury or whether it was unsuccessful, and recoveries should not be reduced according to the degree of success or failure of the intended injury.

(5) *AGAFBO's Van Line Policy*

The Chief Judge found that AGAFBO's van line policy "was so pointed that the assertion it was taken in good faith to protect AGAFBO van line customers strains credibility." He cited AGAFBO actions in singling out Liberty-Pac and its affiliated companies, including Pioneer Overseas Service Corporation (Pioneer),[41] in applying stringent credit terms, in filing lawsuits against such companies for moneys owed to members of AGAFBO, and in protests to the military about such companies. He found these actions showed predatory intent and bad faith. His findings were limited to the trade respondents since evidence on AGAFBO's van line policy was not admitted as to non-trade respondents, apparently because the position of the latter was that they had committed no violation inasmuch as they had not voted for the condemned rate reductions.

Mr. Safir excepts to absolving the non-trade respondents from any liability for their actions regarding the Liberty-Pac/Pioneer/Sapphire group. However, he acknowledged at oral argument before the Board that there was no evidence of record proving non-trade respondents were involved in a conspiracy broader than the condemned rate reductions because the Chief Judge had excluded such evidence as not in issue. The trade respondents argue that AGAFBO's van line credit policy towards the Pioneer group was not capricious or discriminatory but rather based on eminently reasonable grounds, namely, that the charges in questions were long overdue and legitimately owed and that the sanctions taken (new credit arrange-

[41] Pioneer was wholly owned by Mr. Safir and performed many services of household goods movers. See note 2 *supra*.

ments, lawsuits, protests to the Government) were lawful actions.

We are herein concerned with mitigation arguments relating to making certain condemned rate reductions and hence the relevance of the foregoing line of argument is whether trade respondents made the condemned rate reductions in order to protect their van line customers and, if so, whether such action was taken in good faith or in bad faith. The record supports the finding that a key reason for the AGAFBO condemned rate reductions in March 1965 was the desire to keep its members' van line customers competitive with Liberty-Pac, thus enabling AGAFBO to continue to carry the military household goods.

As previously discussed, ODO and MSTS indicated in accepting the Liberty-Pac proposal that other household goods carriers (namely van line customers of AGAFBO) would be given the same opportunity. Such carriers were notified and did seek rate reductions from AGAFBO in order to compete with Liberty-Pac. The military ultimately gave the competing carriers until March 19, 1965, to match the Liberty-Pac proposal. AGAFBO characterized the dilemma it felt that Liberty-Pac posed as follows:

> ". . . there were basically only two possible approaches. The first was to stand firm on the existing rate in which case inland carriers would almost be forced to give their business to Sapphire which on the type of shuttle type operation they apparently contemplate might make it possible during the volume period to perform. Alternatively if they did not give their business to Sapphire and did not reduce their rate, their share of the business would go to Liberty-Pac or the other carriers

> who reduced their rates and went along with Sapphire. The second was to proceed with competitive action to reduce rates on a temporary basis to a level which would permit the other inland carriers to continue in competition with Liberty-Pac." [42]

AGAFBO resolved the "dilemma" on March 9, 1965, by unanimously agreeing to match what was thought to be Sapphire's ocean freight rate on TGBL-HHG on a 30-day basis, to revert to the former level if not extended. The minutes of the meeting indicate that a letter was to be sent to MSTS giving notice of the reduction "with full documentation that the rate is filed purely as a competitive action to protect the interests of all the inland carriers and AGAFBO members who have carried his TGBL cargo since the inception of this movement and clearly stating that we do not feel the rate is fair, reasonable or compensatory." [43] Such a letter was sent to MSTS on March 29, 1965, conveying notice of the rate reduction voted on March 9 and further reduced on March 16, 1965. All the condemned rate reductions, while in effect, were on a temporary 30 to 60-day basis, subject to reversion to the former level if not extended.

In seeking to "protect" their van line customers by voting for the condemned rate reductions in March 1965 it appears fairly certain that the trade respondents were actually protecting themselves. Under the AGAFBO analysis, if the trade respondents failed to reduce their TGBL-HHG rates, their van line customers would go bankrupt or Liberty-Pac would get all the business. In

---

[42] Minutes of AGAFBO meeting, March 4, 1965, Exhibit PC-14, Tr. 955.

[43] Exhibit PC-5.

either event trade respondents would not carry the TGBL-HHG and their van line customers would be in a worse position to pay off existing obligations to trade respondents. Whether or not trade respondents acted in good faith in protecting their own competitive interests presents the basic question of the overriding motivation of trade respondents in making the condemned rate reductions. Trade respondents' van line credit policy, even if unduly discriminatory against Liberty-Pac, which we do not decide, has not been shown to be tied to such respondents' rate reductions.

(6) *Trade Respondents' Motivation for Rate Reductions*

Trade respondents deny any predatory intent against Sapphire in making the rate reductions. They claim they were motivated by a combination of pressures already discussed and also by Waterman's action of withdrawing from AGAFBO and then matching Sapphire's rates. They do not deny a "highly natural" concern over their own competitive position, but they argue that they reluctantly met the Sapphire rates under the pressures cited. They add that if AGAFBO members really desired to destroy Sapphire, instead of meeting Sapphire's rates on a temporary 30- or 60-day basis, they would have done it on a 6-month basis to eliminate the preference Sapphire enjoyed with the military because of its rate filings over the longer period.

The Chief Judge found no support for an attitude of reluctance to meet the Sapphire rates by the trade respondents. He found that AGAFBO was concerned with the possible ripple effect upon military rates in other areas where Sapphire did not operate and that the evidence established a predatory intent by AGAFBO's concerted action to restrain U.S.-flag competition.

We have previously considered all the factors advanced by trade respondents for their alleged good faith effort to meet the Sapphire competition except for two; i.e., the concern over AGAFBO's own competitive position and the actions of Waterman. We are persuaded that for the time period from at least early May 1965 until March 1966, the action of Waterman in relationship to AGAFBO was a significant factor in the continued rate reductions. When certain AGAFBO members voted the initial rate reductions on March 9 and 16 and April 7, 1965, Waterman was a member and voted for the reductions. Thereafter, Waterman decided to withdraw from AGAFBO to fully compete with Sapphire, presumably since they were heavily dependent on military source cargoes and had carried substantial quantities of such cargoes. Waterman filed immediately to meet Sapphire's rate levels effective May 18, 1965. Lykes thereupon formally made the statement in the form of a motion at an AGAFBO meeting on or about May 12, 1965, that it would resign in order to be competitive in the Gulf if AGAFBO did not meet Sapphire and Waterman rates. Most of the other trade respondents testified that this threat of further disembodiment of AGAFBO caused them to assent to continued rate reductions.[44] When Waterman rejoined AGAFBO in March 1966 the AGAFBO rate reductions reverted to former levels.

On the other hand, trade respondents fail to mention that the FMC in Docket 65-13 found, as the Chief Judge found, that the rate reductions were a predatory device:

> "We consider now AGAFBO's ratemaking activities in reaction to Sapphire. AGAFBO reduced its

[44] Tr. 918-19 (USL); Tr. 1100-01, 1105-06 (Mormac); Tr. 1417, 1422-23, 1426 (AEL); see Tr. 681-82, 773-14.

rates to admittedly unreasonable levels with the sole purpose of mitigating any advantage to Sapphire. These rates were used as a *predatory device* to destroy competition and, as found above, were so unreasonably low as to be detrimental to the commerce of the United States contray to section 18(b)(5)" (Emphasis added.)

* * * * *

"AGAFBO's rates were contrary to the public interest because they were *predatory in nature* and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act." 11 FMC 263 (1967) (Emphasis added.)

These findings are a matter of record and have significance in this case.

We therefore find that, along with other motives asserted by trade respondents, which we have found to have had some bearing on their decision, such respondents sought to protect their competitive position by making rate reductions which were predatory in nature. Thus, the initial rate reductions were effectuated immediately prior to commencement of Sapphire's intended TGBI-HHG operations, the first such U.S.-flag competition AGAFBO encountered. The rate reductions exactly matched or in one instance was lower than Sapphire's rates, and AGAFBO's U.K./B-H range members even reconvened on March 16, 1965, to lower the rate reductions further so as to have equivalent rates with Sapphire. The rate reductions were on a temporary 30- or 60-day basis and were to revert to former levels. As already stated, the rate reductions were admitted to be not fair, reasonable or compensatory. Certain intra-line correspondence flatly indicated an intent to drive Sapphire out

of business.[45] Finally, the degree to which AGAFBO watched the developing Liberty-Pac/Sapphire situation,[46] the legal action by trade respondents regarding the Liberty-Pac/Sapphire operation,[47] the concern over van

---

[45] See note 51 *infra* and accompanying text discussing an intra-Lykes memorandum dated June 18, 1965. The notes of an unsubsidized operator, American Union Transport, which attended the March 2, 1965 AGAFBO meetings are also pertinent and stated: "Next the question of Liberty-Pac was dealt with. It boiled down to the method of how to stop Liberty-Pac from starting their new service." (Exhibit NT-15). Testimony indicated the notes referred to AGAFBO's desire "to try and delay or detain the opening of that service until they could clarify some legal or technical questions." (Tr. 1156).

[46] AGAFBO held 21 meetings during the period January 12, 1965 to February 24, 1966, during which the Liberty-Pac proposal and/or Sapphire operations and/or rates were considered. The AGAFBO carriers also made use of certain committees to watch the situation. On January 7, 1965, AGAFBO carriers agreed to notify the President's Committee (a committee of presidents of the U.K./B-H range members of AGAFBO) of the Liberty-Pac situation and "to request they consider appropriate action with all interested Government agencies to protect the interests of the American Flag Berth Operator." (Exhibit PC-78). On April 5, AGAFBO carriers agreed to formation of a committee "for the purpose of keeping all interested parties informed as to developments on both the Sapphire and Project Blond situation. (Exhibit PC-7). Representatives of AEL, Lykes, Waterman and States Marine Liner volunteered to serve on the committee.

[47] On February 24, 1965, AGAFBO filed with the FMC a petition for investigation of the Liberty-Pac/Sapphire rates (Exhibit S-39). On March 2, 1965, the AGAFBO carriers requested "the Secretary . . . . to explore with Counsel the possibility of any legal action having merit which would result in obtaining an injunction or otherwise prevent the utilization of the unreasonable low rate quoted by Liberty-Pac until FMC had acted on the petition.' (Exhibit PC-3.) AGAFBO did not pursue the injunc-

[Footnote continued on following page]

line credit policies to the Liberty-Pac/Pioneer group during this period,[48] and the efforts to have the military suspend or withdraw its approval of Sapphire,[49] all sup-

---

tion suit. On March 4, the AGAFBO carriers agreed to have filed at the FMC a petition for rejection of the Sapphire tariff as violating the Shipping Act, 1916, as amended (Exhibit PC-14). The petition was filed on March 1965 (Exhibit S-70).

[48] On February 15, 1965, AGAFBO carriers noted Liberty-Pac's proposal to the military, the intended services of Sapphire and Pioneer, the highly speculative nature of the new enterprise, and the indebtedness of the participants to member lines and agreed to notify the Pioneer group "that unless all amounts due members lines [prior to November 16, 1964] were paid within seven days from date of telegraphic notice, the Secretary should then immediately request MSTS to request . . . [DOD] to take agreed action to insure collection of such accounts or suspend the carriers' tender." All accounts delinquent after November 16, 1964, were to be placed on a cash basis (Exhibit PC-6). The military replied that AGAFBO's proposed action only against the Pioneer group and not all indebted carriers was discriminatory and the military would not act on that basis (Exhibits S-49, 50). On April 1, 1965, the AGAFBO carriers, after learning of Sapphire's soliciting business, voted to continue requiring compliance with their filed credit terms (Exhibit PC-15). On April 13, 1965, the AGAFBO carriers agreed to initiate court action against all van line members of Pioneer who had balances still outstanding with member lines (Exhibit PC-8). On April 30, 1965, AGAFBO carriers agreed to propose "that the van lines who no longer utilize Pioneer Overseas be given the regular credit period subsequent to the date of separation." (Exhibit PC-9).

[49] On April 2, 1965, AGAFBO sent MSTS a telegram charging a violation of both the Wilson-Weeks Agreement of 1954 and DOD policy requirements for a three-month period of berth service and financial qualifications in MSTS' use of Sapphire (Exhibit PC-12). The military rebuffed the charges (Exhibit PC-19), so AGAFBO carriers on April 7, 1965, agreed to send MSTS a further telegram stating Sapphire had not met MSTS' requirements for carriage of military cargo (Exhibit PC-12).

port a finding that Sapphire's operation was of overriding concern in any AGAFBO action on the U.K./B-H range.

(7) *Individual Circumstances of Each Trade Respondent*

Each of the trade respondents cite individual circumstances which they assert warrant mitigation of any recoveries from them to be imposed for the condemned rate reductions. Most of these circumstances are a repetition of general mitigation factors so that the following discussion is limited to any new matter. Generally, the individual circumstances demonstrate that there were significant individual differences in the extent and motive for participation in the rate reductions.

(i) *Lykes*—The Chief Judge found that Lykes took the lead "in the unlawful conspiracy to drive the Sapphire competition" from both the Atlantic and Gulf U.K./B-H range trades with full predatory intent to injure Sapphire. He found no circumstances mitigating full enforcement of Section 810 as to Lykes. He cited the facts that Lykes was the moving party to reduce the military TGBL-HHG rate on March 9, 1965, that on April 30, 1965, Lykes attempted unsuccessfully to get AGAFBO to meet all of Sapphire's military rates on the U.K./B-H range, and that on May 12, 1965, Lykes threatened to withdraw unless AGAFBO met the Sapphire and Waterman rates. In particular, as evidence of Lykes' motivation, he cited an intra-Lykes memorandum dated June 18, 1965, by W. J. Amoss, Jr., Chief Traffic Officer, which included the statement that Lykes was "the leader" in "the fight" . . . to prevent Sapphire from getting more than his share of MSTS' cargo" and that in time Lykes would "whip the situation down to where Sapphire only gets a share, and this is the same as saying he will have

to go out of business." Public Counsel supports the Chief Judge's findings.

Lykes objects to the Chief Judge's "gross discrimination." It argues that it acted out of necessity to meet its major competitor Waterman. ("If Lykes was to retain a share of the military cargo, the Waterman competition left it no choice but to meet Waterman's rates irrespective of the activities of Sapphire.")[50] Lykes claims that there is no evidence that it was especially avid in its goal and argues that the fact of making a motion creates no greater blame than voting on the motion. It argues that the June 18th letter had nothing to do with rate reductions, adopted a month before, but rather the preference Sapphire enjoyed with the military which the military subsequently acknowledged was "of questioned validity and equity." It pleads the rate reductions were the only choice for Lykes and other AGAFBO members because they could not resign, as the conference, which benefitted both the operators and the Government, would fall apart. Finally, it contends AGAFBO had no obligation not to compete with Sapphire and Liberty-Pac, which hoped to achieve a monopoly of TGBL carriage on the U.K./B-H range, provided it did not compete unfairly by undercutting Sapphire's rates which was not done.

There is certainly no individual circumstances involving Lykes that warrant any further mitigation than permitted from the general arguments already considered. Lykes offered the first motion to reduce AGAFBO military household goods rates to match those of Sapphire, and it persuaded other AGAFBO carriers to acquiese in

[50] Supplemental Brief and Exceptions on Brief of Lykes Bros. Steamship Co., Inc. at 6.

its motion for reducing the rates on general military cargo by threatening to follow Waterman's action for resignation from the conference. It attended all AGAFBO meetings discussed herein and apparently voted for every proposed continuation of the condemned rate reductions. Its leadership and its purpose to have Sapphire "go out of business" are stated in the contemporaneous June 18th memorandum.[51] Lykes' present assertion that it would not have resigned from AGAFBO because of the benefit of the conference to the Government and the operators, is inconsistent with its threat of resignation in May 1965.

(ii) *AEL*—The Chief Judge found that AEL's initial participation was reluctant, but that it did eventually concur in the rate reductions. He found the evidence

[51] "As you know, the fight is running hot and heavy to prevent Sapphire from getting more than his share of MSTS' cargo. We have been the leader in this although latterly joined by Waterman who exceeded our zeal somewhat by resigning from AGAFBO.

"It has been our position that we should meet Sapphire head-on and promptly and force him to live with the same conditions we have to live with. U.S. Lines joined by Export, Isbrandtsen, Moore-McCormack, States Marine-Isthmian have not favored our approach. Except for States Marine, the others have been more or less USL controlled and there has been little we can do except get out of AGAFBO which forfeits much that is important to us in the Far East and Mediterranean, for which reason we were reluctant to take such a step. In the meantime, the fight goes on with MSTS and is also being waged with DOD, and there is some prospect that success will be had through the DOD-Secretary of Navy avenue. Under these circumstances, we have not attemped to follow by an analysis in depth, each of the Sapphire ships, but I am convinced of this; it may take time but we will eventually whip this situation down to where Sapphire only gets a share, and this is the same as saying, he will have to go out of business." (Exhibit PC-123.)

unclear on whether the reduced rates at which AEL carried military TGBL-HHG cargo were in fact compensatory. Public Counsel argues that under court order the compensatory character of the rates cannot be relitigated and warns against such relitigation if the compensatory character is considered in mitigation.

AEL argues that the reduced rates were compensatory, that it disagreed with other AGAFBO members that the rates were not compensatory, and that surely AEL should not be penalized for having charged fully compensatory rates. It emphasizes that it had a limited subsidized berth service to the U.K./B-H range, that such service was dedicated to carriage of commercial not military cargo, and that the only military commodity for which there might have been any actual rate competition between Sapphire and AGAFBO was the carriage of TGBL-HHG.

We note that AEL's subsidized berth service to the U.K./B-H range was limited and was dedicated primarily to carriage of commercial cargo, with only a small percentage of military household gods. It suffered a loss on all voyages in this range during the violation, before and after subsidy. It was originally opposed to any rate reduction and consented to reducing the TGBL-HHG and FIO-HHG rates based on advice of counsel. It agreed to reduction of the general military cargo rates only after the breaking up of AGAFBO appeared imminent without such reduction. However, AEL did attend every relevant AGAFBO meeting, did have a keen interest in the Sapphire situation, did vote for the condemned rate reductions, even if reluctantly, and did support their repeated extensions.

As for the compensatory character of the rate reductions, AEL voted for the March 9, 1965 motion to reduce the AGAFBO military TGBL-HHG cargo rate. That motion described the rate reduction as not compensatory even though AEL now contends the reduced rates were compensatory in that they covered fully distributed costs as well as out of pocket costs. Further, the FMC found such rates were so unreasonably low as to be detrimental to the commerce of the United States and the court has ordered us not to relitigate that finding. We therefore are precluded by trade respondents' admissions and court order from reopening the matter as a mitigating factor.

(iii) *Mormac*—The Chief Judge found that although Mormac was originally reluctant to join in the condemned rate reduction actions, it decided to do so for competitive reasons, despite the fact that military TGBL-HHG cargo represented a minimal amount of its cargo. Mormac emphasizes that it had a limited number of calls in the B-H range and that it acted to extend the rate reductions because it feared to lose substantial amounts of military cargo to Waterman and not because of any motive to injure Sapphire. Mormac states it did not solicit the military TGBL-HHG cargo because the van lines were delinquent in making payment of ocean freight charges.

Essentially, Mormac's individual situation is the same as that of AEL's. Both had limited subsidized service in the U.K./B-H range which suffered losses after subsidy; both carried primarily commercial cargo and very little military household goods; both were reluctant initially to agree to the condemned rate reductions; both did in fact vote for the reductions; and both continued to vote for the reductions until the rates reverted to their former levels.

(iv) *Bloomfield*—The Chief Judge found that Bloomfield had no continuous competition with Sapphire and that Bloomfield's participation in the Section 810 violation was minimal—"primarily in the form of two telephone call votes, one of which was ineffectual." He noted, however, that on both occasions Bloomfield agreed to extend the rate reductions and that it had filed a discriminatory suit against Allied Van Lines and Pioneer for overdue freight. He recommended recoveries from Bloomfield be halved on account of its minimal participation.

Bloomfield vigorously protests the Chief Judge's finding of any recovery and argues that its insignificant participation in AGAFBO warrants no sanctions under Section 810. It explains that one telephone call vote was after the motion had been defeated and the other was a proxy evercised at a time when it had three of its vessels chartered to the military. It claims it is unfair to impose sanctions against Bloomfield, who lost $500,000 in 1965 after subsidy, and who participated less in AGA FBO actions than did the non-trade respondents. It argues that the evidence regarding the lawsuit against van line customers was improperly and prejudicially admitted into the record by the Chief Judge, and that such evidence must be excluded. Finally, it argues that recovery against Bloomfield would serve no purpose because it has been out of business for some years and could not impede Sapphire's reentry into shipping.

Public Counsel replies that there does not appear to be any prejudicial error in the admission into evidence of the fact of the van line lawsuit for the limited purpose indicated. He commented in proposed findings before the Chief Judge that Bloomfield evidenced an attitude of

reckless apathy towards its responsibilities of AGAFBO membership by absolutely deferring to other members. As for Bloomfield's defunct status, he points out that the arguments for no recovery ignore the fact that the Government is withholding $120,000 of subsidy accrued during the period and that the benefits of reduced recovery will inure to the surviving parent, States Marine Lines, Inc.,[52] and that any recovery could not contribute to the loss of a participant in the U.S. merchant marine, since Bloomfield is already defunct.

Bloomfield operated only in the Gulf on T.R. 21 with four C-2's carrying primarily commercial cargo. Unitl December 1965, it was a subsidized operator and member of AGAFBO, with the right to vote on U.K./B-H range issues; however, it attended only two AGAFBO meetings out of 21 during the time period discussed. Although it voted only twice on the AGAFBO rate reductions in the U.K./B-H range, both times it voted for such reductions. It had on file at the FMC the AGAFBO tariffs and it carried military cargo pursuant to those tariffs. While it was a small organization its disregard of its responsibilities as an AGAFBO member, especially when that organization was taking action found to have intended to crush other U.S.-flag competition, cannot be condoned.[53]

---

[52] States Marine Lines, Inc., and Waterman part-time, were the other AGAFBO U.K./B-H range carriers during the period of violation.

[53] An executive for Bloomfield explained that company's participation in AGAFBO as follows:

> "We decided to join, somewhere in the prior years—our participation was inactive, so to speak. We followed the deliberations and the activities of the meetings through the minutes and occasional telephone calls from Mr. Han-

[Footnote continued on following page]

Apparently, copies of AGAFBO minutes and pertinent information were regularly sent to Bloomfield and it could have submitted, as it did on at least one occasion,[54]

a proxy vote on important matters, such as the condemned rate reductions. The complaint of admission into evidence of the fact of an alleged Bloomfield discriminatory van line lawsuit is mooted in view of our finding that it has not been established that the AGAFBO van line credit policy was tied in any material manner to the condemned rate reductions. Bloomfield's present defunct status presents no basis for mitigation. While the defunct status does remove any possible competition between it and the also defunct victim, it does not remove the issue of the effect of Section 810 violations upon future U.S. operators finding themselves in similar circumstances.

(v) *USL*—The Chief Judge found that USL agreed to the rate reductions to protect its van line customers and to retain a share of the military cargo. The Chief Judge also found that for the most part USL thereafter opposed any and all rate reductions but that USL shares responsibility with the other followers for violating Section 810.

---

sen. Our feeling was, being a new company and emphasizing concentrating on developing commercial packages, we felt we couldn't persuade this matter.

We were down in he Gulf Coast. We had representatives in other companies and representatives in New York. It was possible for them to attend. We didn't feel our voice would be persuasive one way or the other. We felt these older lines and bigger lines, and longer established lines—we expected and hoped the decisions they reached would be good ones." Tr. 1364-65.

[54] Exhibit USL-8.

USL denies that it was a part of any "conspiracy" to drive Sapphire from the U.K./B-H range and argues it assented to temporary rate reductions only to protect its van line customers and deter others from following Waterman. It argues it has been punished enough by the loss it sustained on military cargo carried during the period at the reduced rates it tried to prevent.

USL is presently an unsubsidized operator. It had a very extensive subsidized operation on the U.K./B-H range during the period of violation, operating predominately a commercial service. It was initialy opposed to any AGAFBO rate reductions to match the Sapphire rates but did agree to the initial reductions on military household goods on a temporary basis, principally to protect its van line customers. It agreed to reduce temporarily the AGAFBO rate on general military cargo, only to avoid disembodiment of AGAFBO. It offered the unsuccessful motion on April 23, 1965, to permit the FIO-HHG rate to revert to the former level. It voted extending the rate reductions on July 27, September 22, and October 25, 1965.

There is a further unique circumstance involving USL's operation, i.e., its passenger ship SS UNITED STATES operated with subsidy on T.R. 5-7-8-9 during this time period. In view of the dissimilarity of passenger and cargo ship operations and of Sapphire having operated no passenger ships, we are persuaded, as a matter of discretion, that recovery from USL for past violation of Section 810 should not be related to subsidies received for such passenger ship operations. No other trade respondent operated any passenger ship on a subsidized service on the U.K./B-H range during the period of violation.

IV. *Recoveries Under Section 810*

Section 810 of the Act provides as follows concerning recoveries for violations thereof:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The interpretation of "payment or subsidy" and ancilliary language is disputed, as well as the application of the statute to the circumstances of each individual trade respondent. Mr. Safir also disputes the extent to which the statute is intended to aid the victim, other than providing for a private treble damage suit in court.

A. *"Payment or Subsidy"*

The Chief Judge, supported by Public Counsel, found that "payment or subsidy" includes ODS, rate subsidies on carriage of preference cargoes paid by the executive departments (such as Agriculture, A.I.D.), the privilege of depositing earnings in tax deferred ship replacement reserves, the extent the charter hire rate under a use agreement executed pursuant to Section 510(d) of the Act is less than the commercial rate, and the extent the sales price for Government owned vessels purchased pursuant to Section 704 of the Act and the Merchant Ship Act of 1946, 50 U.S.C. App. 1735, are less than commercial prices be-

cause of reduction by any applicable CDS less depreciation. He found that pursuant to Title V, CDS was paid to the shipyard, not the shipowner, and was not recoverable under Section 810 against the shipowner. On these premises the Chief Judge urged total recoveries from Lykes of $5,071,399.69; from AEL of $168,885.82; from USL of $3,451,715.17; and from Bloomfield of $91,579.

Public Counsel is of the opinion that the Chief Judge's formula for ODS recovery (percentage of ODS received for carriage of military cargo in competition with Sapphire) is the rock bottom that will provide any effective deterrence to violations of Section 810. He considers that "payment or subsidy" in the context of the Merchant Marine Act is limited to those aids provided to the maritime industry. He includes "payments" within "subsidies" and defines that term as follows:

> "A subsidy is an act by a governmental unit involving either (1) a payment, (2) a remission of charges, or (3) supplying commodities or services at less than cost or market price, with the intent of achieving a particular economic objective, most usually the supplying to a general market a product or service which would be supplied in as great quantity only at a higher price in the absence of the payment or remission of charges. (Joint Committee Print, Subsidy-Effect Programs of the U.S. Government, 89th Cong., 1st Sess. 9 (1965)."

Trade respondents argue that Section 810 is designed to take away only the advantages ODS operators have under the 1936 Act over unsubsidized operators. If interpreted as applicable to factors other than ODS, they believe Section 810 to be irrationally discriminatory and of questionable validity. Further, they claim that Section

810 is penal in purpose and therefore is to be narrowly defined. In other words, they contend Section 810 only provides for recovery of ODS "paid for service on the route and to the ports served by a competitive U.S.-flag common carrier entitled to the protection of Section 810, limited to the period of such competition."

Mr. Safir argues that Section 810 applies to "[a]ll subsidies and payments actually accrued during, or reasonably allocable to, the period of violation," and that no basis exists for constricting consideration of recovery to certain types of vessels, trade routes, ports, direction of carriage or vessel-to-vessel departure dates. He includes, in addition to those recoveries recognized by the Chief Judge, CDS under Title V, based on the 11 month period of violation in relation to the useful life of ships; "the premium paid on all cargoes moved during the eleven (11) month period for the Department of Defense"; and interest from the date of violation on all recovered subsidies. His measure of recovery of ODS and premium freights is "a refund equivalent to the same percentage reduction as the AGAFBO rates were dropped in the North Atlantic to drive Sapphire out of business." He claims that it "was the protection of this premium freight plus the van line credit agreement that kept, both the trade and non-trade respondent's together as co-conspirators." Mr. Safir has indicated that under this approach the gross recovery approximates half a billion dollars and that the entire amount might possibly be waived "if the interests of the victim in his desire to return to the shipping industry have been satisfied."

In determining the standard for recovery for past violations of Section 810, we consider the legislative history of the Act, its language, and standard principles of

statutory construction. The 1936 Act provided a new method of subsidizing the U.S. shipping industry primarily by CDS and ODS. During the course of the Senate floor debate preceding enactment, it was noted that there had been testimony that a "United States line which operates between the port of New York and South Africa, and enjoys a subsidy from the Government of the United States, is in agreement with British lines, foreign lines, crushing out of existence an American line which enjoys no subsidy, and which operates between the port of New York and South Africa" and that "an American line which is in competition with all the conference lines . . . assured [the Senate committee] . . . that without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line, [it] could compete with all the lines of the world." [55] It was thereafter commented that in considering a subsidy to be paid to shipping concerns for the purpose of building them up Congress should scarcely permit a condition to exist which apparently would result in tearing down American shipping.[56] Based upon this senatorial colloquy an amendment, which eventually became Section 810, was proposed the next day with the comment that "it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, to crush American competition." [57]

The first paragraph of Section 810 states, "It shall be unlawful for any contractor receiving an operating subsidy under Title VI or for any charterer of vessels under Title

---

[55] 80 Cong. Rec. 9921 (1936).

[56] *Id.* at 992.

[57] *Id.* at 10075.

VII" to engage in certain specified conduct in regard to certain U.S.-flag citizens operating as a common carrier by water. The first sentence of the second paragraph states, "No payment or subsidy of any kind shall be paid directly or indirectly . . . to any contractor or charterer who shall violate this section."

The legislative history and the statutory language show that Congress had two principal concerns in enacting Section 810: primarily, removal of the added burden that U.S. payments to the violators imposed on the victim; and secondarily, imposing a deterrent effect on any contemplated violations and especially to induce cessation of current violations. The Second Circuit concluded that these objectives are extended to recovery for a past violation and that Congress sought by such recovery to impose "an added cost on the violators and thus . . . partially make up the victim for the burden which the earlier payments indirectly imposed on him." [58]

It follows that recovery for past violations requires a different standard for recovery of "payment or subsidy," as contemplated in Section 810, than non-payment for

[58] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969). Trade respondents argue that under the Second Circuit decision recovery for past violations of Section 810 is based on common law principles and not statute. However, the Second Circuit merely stated the statute did not expressly authorize such recoveries. It found by necessary implication from common law principles that "§ 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past." *Id.* at 978. Thus, recoveries considered in this proceeding are grounded on statutory authority, as interpreted by the Court.

existing violations.[59] The instant violation ceased long before it was established to be a violation and requiring return of all subsidies and payments made by the Government to the violators for the period of the past violation would appear to result in frustrating the general policy of the Act to foster the development of the U.S. merchant marine. Some guidance to the intent of Congress in requiring recovery of "payment or subsidy" paid during past violations is provided from the legislative history showing its concern was in the content of the ocean mail subsidy being paid at that time and the operating subsidy to be provided by the 1936 Act. Further, Congress carefully drafted Section 810 to apply only to Title VI contractors and Title VII charterers, [60] who generally receive operating subsidy; it conspicuously failed to mention Title V contractors, who receive the benefits of construction subsidy. Such careful drafting avoided an imposition of recovery which would have resulted in discriminatory treatment

[59] In *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969), the Second Circuit found: a) ". . . the duty of the administrator may be less absolute [for recovery of subsidies improperly paid in the past to violators] than is the obligation to cease payments to current violators." *Id.* at 977, b) "So far as concerns payments, as distinguished from recoveries, the statute is mandatory where applicable . . . and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American Merchant Marine." *Ibid.* c) "While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited." *Id.* at 987. *Accord*, *Safir* v. *Gibson*, 432 F.2d 137, 140 (2d Cir.), *cert. denied*, 400 U.S. 972 (1970).

[60] None of the respondents were Title VII characters and therefore the issue of what recoveries Section 810 requires of such persons who violated the statute in the past is not before us.

against ODS contractors with no overriding public policy being served by the return of all payments inasmuch as the violation has ceased. Discriminatory treatment of ODS contractors would result if CDS or premium payments on P. L. 480 preference cargoes were required. That is to say, the ODS operator would be treated more harshly under the 1936 Act and other shipping laws of the United States than the non-ODS operator who received only CDS or a non-ODS AGAFBO carried who received P. L. 480 premium payments and who, as it has been found, committed the same unjustly discriminatory and unfair actions taward Sapphire as did the respondents in this proceeding. Statutes are to be construed rationally and to avoid producing inequality and injustice, if another and more reasonable interpretation is apparent.[61] Consistent with this rule of statutory interpretation, and for the reasons stated, we conclude that Congress did not intend recovery in excess of ODS payments.

As previously discussed, it is our view that we have discretionary authority under the statute to determine whether and to what extent to recover ODS for past violations of Section 810 from Title VI contractors in order to implement the policies of the Act.[62] We have also previously considered certain general mitigatng factors raised by trade respondents, including reliance on advice of counsel and the Waterman's nearly concurrent competitive challenge, and concluded they were of some significance to

---

[61] *E.g.*, *Shattuck* v. *Gallagher*, 218 F.2d 428, 429 (6h Cir. 1955); *Johnston* v. *United States*, 163 Ct. Cl. 375, 379, (1963); *Yankee Network* v. *F.C.C.*, 107 F.2d 212, 219-20 (D.C. Cir. 1939); 3 Sutherland, *Statutory Construction* § 6006 (3d ed. Horack 1943).

[62] See pp. 20-22 *supra*.

the respondents' action in making the condemned rate reductions. It is our judgment that these general mitigating factors warrant limiting recovery of subsidy payments to those made for the operation on the trade routes covered by the condemned rate reductions. There is a further general mitigating circumstance that we consider carries particular weight, namely, this is the first case imposing, or even contemplating imposing, recoveries for past violations of Section 810. Under such circumstances and considering the extended consideration which has been required of this matter, the respondents cannot be said to have been fully aware of the extent of financial consequences for past violations. After carefully considering all of the facts and policy objectives of the Act applicable to trade respondents' violations, we are persuaded to further limit their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade routes whereon the condemned rate reductions were in effect.

In deciding that Section 810 provides only for recovery of ODS payments for past violations, which may be reduced in our discretion, we have concluded that other forms of Government "payment or subsidy" are not recoverable. Interest charges are also not recoverable since interest is not and cannot be an element of ODS payments.

B. *Individual Recoveries*

We have decided not to seek recoveries from the nontrade respondents due to their mere technical violations of the Act. We have also decided to limit recoveries from trade respondents due to general mitigating circumstances previously discussed. In addition, we decided to further limit recoveries from certain, but not all, trade respondents due to their individual mitigating circumstances.

(1) *Lykes*

The special circumstances asserted by Lykes present no basis for any greater mitigation than is recognized as applicable in general mitigation for trade respondents. Hence, the amount to be recovered from Lykes is the percentage of ODS received from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received therefrom during the period of violation.

During the 11 month violation, Lykes operated a liner service on Trade Route 21, Line B-2, U.S. Gulf ports—East Coast U.K. and Continental Europe (Bordeaux/Hamburg) and Line B-1, Gulf to W. Coast U.K. and Ireland, under subsidy contract FMB-59. On such services Lykes accrued total ODS payments of $3,227,999.93 for the period March 30, 1965 to March 1, 1966. Lykes claims it received total revenues from subsidized service on T.R. 21 during that period of $9,057,528.95. That revenue, however, is just the amount generated by vessel operations calling on T.R. 21 ports served by Sapphire. The total revenue generated by Lykes service on T.R. 21 during that period does not appear of record. For present tentative purposes we will use the $9,057,528.95 figure adn presume until further documentation is provided that the same Lykes' ratio of military cargo revenue to total revenues is derived for total service as for that part served by Sapphire. It appears that on the same restricted basis Lykes generated revenues from general military cargo and TGBL-HHG of $,170,891.68 (Exhibit Lykes—6A & B) or 35.01% of the total revenues received on ports served by Sapphire on T.R. 21. On the basis of these assumptions, Lykes owes in recovery for violating Section 810 about $1,130,123. Therefore, we find that upon terms satisfactory to the Board, Lykes must refund approximately such sum or forego future subsidies until that amount has been satisfied.

(2) *AEL*

The special mitigating circumstances relative to AEL have been enumerated concerning its limited service on the U.K./B-H range and reluctant but eventual participation in the condemned rate reductions. Such circumstances, in our judgment, merit some further mitigation of recoveries, although the amount to be reduced is not susceptible of exact measurement. In our judgment, we consider the record supports a 25% reduction in recoveries that would otherwise be required.

Under ODS Contract No. FMB-87 AEL during the period of violation maintained an unsubsidized liner service on T.R. 5-7-8-9 between U.S. North Atlantic ports and ports in the United iKngdom and Continent (Line H) and a subsidized liner service on T.R. 5-7-8-9 after the close of the Great Lakes navigation season (Line G). Presently, AEL has no subsidized liner service on T.R. 5-7-8-9, but it has other services which are subsidized under FMB-87. For the subsidized voyages on the U.K./B-H range during the period March 30, 1965 to March 1, 1966, AEL accrued total ODS of $203,511. It appears from the record that such voyages generated a total revenue of $488,643 of which commercial cargo accounted for $372,478 and military cargo $116,165 (Exhibit AEL-G). AEL maintains that it did not separately account for TGBL-HHG since it amounted to only about 1½% of total commercial cargoes and was not statistically important. The 1½% of $488,643 would amount to $5,587. Therefore, total military cargo revenue for AEL's subsidized service on T.R. 5-7-8-9 for the period of violation amounted to about 24.92% of total revenues. That percentage indicates AEL owes in recovery $50,715, which when reduced by 25% is $38,036. AEL must refund this approximate sum to the Board on satisfactory terms.

(3) *Mormac*

The special mitigating circumstances for Mormac have been found to be similar to those for AEL and therefore the additional reduction of recoveries due to such circumstances will be by the same percentage (25%) as for AEL. During the period of violation Mormac operated a subsidized liner service on T.R. 6 between U.S. North Atlantic ports and ports in the Baltic Sea and was authorized to make calls on T.R. 5-7-8-9 at Rotterdam and Antwerp and (with a waiver from USL) at Bremerhaven, under ODS Contract FMB-48 Revised. Forty of Mormac's total subsidized voyages eastbound touched at ports on the U.K./B-H range and twenty-two subsidized voyages westbound. Its total accrued ODS for the period March 30, 1965 to March 1, 1966, for service on T.R. 6 with calls on T.R. 5-7-8-9 was $2,359,290. The comparable ODS figure for only the calls on T.R. 5-7-8-9 is not of record. A total of $980,000 in ODS remains effectively unpaid due to a court injunction. The company asserts that $560,000 of that amount represents funds accrued during the period of violation. During the period of March 30, 1965 to March 1, 1966, it earned revenues from general military cargo and TGBL-HHG cargoes of $3,018-022 from the U.K./B-H range out of total revenues for the range of something less than $10,836,080.[63] Using

[63] The military cargo revenue figures include revenue from carriage of military refrigerated cargo since we are not persuaded to further mitigate Mormac's recovery to exclude such cargo, even though Sapphire's carriage of such cargo was of a limited amount. The total revenue figure is an overapproximation since it includes commercial cargo revenue derived from ports outside of the U.K./B-H range. While Mormac Exhibit IV purports to indicate total revenue earned on the U.K./B-H range ($5,172,160), that figures seems questionable since it would indicate over half of the $12,001,201 total revenues earned on Mormac's entire North Atlantic operation were earned outside of the U.K./B-H range.

such figures until we receive further documentation and under the formula heretofore stated, we find Mormac would owe $656,590 in recovery. That amount reduced 25% for special mitigating circumstances to $492,443 is the amount approximately to be withheld from that presently owing Mormac as recovery for violation of Section 810.

(4) *Bloomfield*

The special circumstances of Bloomfield, as previously discussed, have both mitigating and non-mitigating aspects. Its actual participation in the AGAFBO condemned rate reductions was minimal, but it did support the rate reductions. Its minimal participation was not due to any opposition or concern over the rate reductions but rather to a nearly complete faith that whatever the majority voted would be good for all. It is certainly not sound public policy to countenance such disregard by Bloomfield of its responsibility as a conference member by mitigating wholly or almost completely any recoveries due for its violation of Section 810. Upon weighing all the circumstances, however, we consider that a similar reduction in recoveries (25%) for Bloomfield, as permitted for AEL and Mormac, is warranted.

Bloomfield had a subsidized liner service on Trade Route 21 between the Gulf and North Europe during the period of violation under ODS Contract FMB-27 only until December 1, 1965. On June 9, 1971, its successor, E.P. Shipping Company, filed with the State of Delaware a certificate of corporate dissolution, having earlier liquidated. Previously, all stock passed to States Marine Lines, Inc. on January 3, 1966. The company earned total accrued ODS during the period of violation of $758,-163. By court injunction $120,000 in ODS accrued during

that time has been withheld. On a tonnage basis the military cargo carried by Bloomfield (including TGBL-HHG) was 24.7% of total carriage.[64] Presuming, until further documentation, that the percentage would be the same for revenues from such cargo in proportion of total revenues, Bloomfield owes approximately $140,450, accounting for the 25% mitigation, in recovery for violation of Section 810. The withheld $120,000 of ODS due is hereby acknowledged as partial satisfaction of amounts owing for such violation.

(5) *USL*

The initial reluctance and then opposition to the condemned rate reductions by USL have been discussed. It appears USL actively sought to have AGAFBO terminate the rate reductions long before the AGAFBO U.K./B-H range carriers collectively terminated such reductions. While these circumstances in no manner enable USL to escape from liability for the conference actions, they are important to the recoveries to be imposed for these past violations. We are persuaded that USL's recoveries should be substantially reduced, namely by 50% from the amount that would otherwise be due.

During the period of violation USL operated a subsidized liner service on T.R.'s 5-7-8-9 and 11 under ODS Contract FMB-19, but it no longer has any ODS agreement with the Government. Total ODS accrued during the period March 30, 1965 to March 1, 1966, for USL operation on the U.K./B-H range was $17,853,204. That

[64] Bloomfield's subsidy figures are calculated from Exhibits BL-1 and PC-169. The tonnage figures are for the period April 1, 1965 to December 30, 1965, only (Exhibit BL-10). The record apparently contains no comparable, legible revenue figures.

amount includes subsidy for the passenger ship the SS UNITED STATES, which when excluded, results in net ODS of $11,082,875. The extent of military and TGBL-HHG cargo revenues from operation on T.R. 5-7-8-9 during this time period in relation to total revenues is controverted, the Chief Judge claiming 30% and USL 17.5%.[65] Accepting for the present, until further documentation is provided, USL's figure and that the same ratio would be applicable to T.R. 11 operations, we find USL would owe $1,939,503 in recovery for violation of Section 810, which reduced by 50%, results in about $969,752. Approximately such sum must be refunded to the Board upon satisfactory terms.

C. *Recoveries or Benefits to Mr. Safir.*

Mr. Safir throughout the proceeding has argued that the Second Circuit in *Safir* v. *Gibson* desired a nexus between the sanctions of Section 810 and the victim's competitive interest in re-entering the shipping industry. He has proposed, for instance, that he waive his standing in this case in return for the stock of one of the respondents. Neither the Chief Judge nor Public Counsel were persuaded by Mr. Safir, and obviously the respondents were opposed to any such proposal. Moreover, even if he had never protested the conference's action, the Board would be required under the statute to act whenever it becomes aware of any violation of Section 810.

We are unaware of any authority for Mr. Safir's suggestion or argument. Section 810 provides for a private

[65] USL's subsidy figures are contained in Exhibit USL-13. There appears to be no record documentary evidence of the ratio of military cargo revenue to total revenue during the period of violation.

treble damage suit so that the victim may recover for "damages by him sustained". Recoveries required as a result of this proceeding are not under authority of that part of Section 810 but rather the following:

> "No payment or subsidy of any kind *shall be paid* directly or indirectly *out of funds of the United States or any agency of the United States* to any contractor or charterer who shall violate this Section." (Emphasis added.)

That provision is concerned with Government funds paid to an ODS contractor and therefore concerns the recovery of the Government's payments. No authority is cited for paying over such Government payments, which are recovered, to a private person or corporation. Further, no authority is cited to require a subsidized operator to pay stock or any other property or moneys to a private person or corporation under such provision. Again, Mr. Safir's remedy is provided separately from the Government's recovery of moneys paid.

As we understand the Second Circuit's decision, the Court in making statements such as the following:

> "Recoveries of such payments poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him." [66]

was finding that the victim had an interest and standing to see that a decision was rendered on whether to recover past payments. Such payments, recovered by the Government, would remove operating subsidy from the violators and hence "partially make up to the victim" the former burden it had in encountering the violators with their operating subsidy advantage.

[66] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969).

CONCLUSION

Based upon the foregoing discussion and findings and after full consideration of the record compiled in this proceeding, including all arguments and presentations by all parties and the Chief Judge's Recommended Decision, we find and conclude that:

1) All respondents violation Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Company, and

2) In consideration of pertinent mitigating circumstances respondents owe. Subject to documentation by said respondents and Public Counsel, the following for such violations of Section 810:

   (a) Respondents APL, Farrell, Grace and Prudential, who did not compete with Sapphire and whose violations are technical olny, no amount;

   (b) Respondent Lykes about $1,130,123 to be accounted for on terms satisfactory to the Government;

   (c) Respondent AEL about $38,036 to be accounted for on terms satisfactory to the Government;

   (d) Respondent Mormac about $492,443 to be withheld from operating subsidy amounts

presently owed and incurred during the period of violation;

(e) Respondent Bloomfield about $140,450 partially to be withheld from operating subsidy amounts of $120,000 accrued during the period of violation but not yet paid;

(f) Respondent USL about $969,751 to be accounted for on terms satisfactory to the Government.

Trade respondents, and Public Counsel as he deems necessary, are to submit on or before May 16, 1973, their views and supporting documentation on the exact ODS amounts recoverage for violation of Section 810 consistent with the decision herein. Any replies to such submissions are to be filed within ten days after service of such submissions. An order determining final recoveries will thereafter be issued. Upon issuace of said order on final recoveries this decision will become final.

So Ordered by the Maritime Subsidy Board/Maritime Administration.

Dated: April 9, 1973

AARON SILVERMAN
Assistant Secretary

Appendix O—Decision of United States Court of Appeals, Dated November 29, 1972

EXHIBIT 9

Decision (Per Curiam)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 237—September Term, 1972.
(Argued November 27, 1972 Decided November 29, 1972.)
Docket No. 72-1753

MARSHALL P. SAFIR,
Appellant,

v.

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al., MOORE-MCCORMACK LINES, INC., UNITED STATES LINES, INC., AMERICAN EXPORT LINES, INC., and PRUDENTIAL-GRACE LINES, INC.,
Appellees.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal for an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* denying plaintiff's motion for an order requiring the payment into escrow of sums expected to be received by the ship operator defendants on the sale of certain ships.

Affirmed.

PER CURIAM:

In this case, which is now here for the third time, see *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969); *Safir* v. *Gibson*, 432 F.2d 137 (2 Cir.), *cert. denied*, 400 U.S. 850 (1970), plaintiff Safir moved to require the ship operator defendants to pay into escrow moneys expected to become payable to them in consequence of the sale of certain American flag ships authorized by Public Law 92-296, which became effective May 17, 1972. The motion was based on plaintiff's fear that the defendants might not be financially able to respond to a direction for the repayment of operating differential subsidies which may be made by the Maritime Administration Maritime Subsidy Board in the proceeding, Docket No. S. 243, instituted as a result of our first decision. The Assistant Secretary of the Board and of the Administration submitted an affidavit indicating that the Government entertained no doubt of its ability to recover, by set-off or otherwise, any amounts that might ultimately be found to be repayable. Accepting this conclusion, the district court denied the requested relief.

The judge's order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of three of the four ship operator defendants. We share plaintiff's concern over the time that the Maritime Administration has taken to decide this matter, especially in light of the narrowing of the issues by our 1970 decision. However, we were advised at argument that, at long last, the matter has now been finally submitted, and we expect it to be promptly decided.

Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the

Government. This statement was unnecessary to the decision and we have no occasion either to approve or to disapprove it.

Affirmed.

MARSHALL P. SAFIR, *Appellant Pro-Se*

GILBERT S. FLEISCHER, Esq., New York, N.Y., Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Esq., Assistant Attorney General, Robert A. Morse, Esq., United States Attorney, of Counsel), *for Appellees Robert J. Blackwell, Maritime Administrator, et al.*

RICHARD S. SALZMAN, Esq., Washington, D.C. (J. Franklin Fort, Esq., Kominers, Fort, Schlefer & Boyer, Washington, D.C., of Counsel), *for Appellee Moore-McCormack Lines, Inc.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, New York, N.Y., of Counsel), *for Appellee United States Lines, Inc.*

JAMES N. JACOBI, Esq., Washington, D.C. (Kurris and Jacobi, Washington, D.C. of Counsel), *for Appellee United States Lines, Inc.*

MICHAEL O. FINKELSTEIN, Esq., New York, N.Y. (Barrett, Knapp, Smith, Schapiro & Simon, New York, N.Y., Daniel H. Margolis, Esq., and Bergson, Borkland, Margolis & Adler, Washington, D.C., of Counsel), *for Appellee Prudential-Grace Lines, Inc.*

Appendix P—Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
68 C 643

MARSHALL P. SAFIR,

Plaintiff,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al.,

Defendants.

DOOLING, *D.J.*:

Plaintiff moves for an order requiring the Secretary of Commerce to pay the purchase price of the S.S. UNITED STATES into escrow and to establish an escrow of all amounts payable to the present shipowners upon their sales of the S.S. ARGENTINA, the S.S. BRAZIL, the S.S. SANTA ROSE, the S.S. SANTA PAULA, and the S.S. CONSTITUTION; the amounts referred to are expected to become payable under the provisions of Public Law 92-296 effective May 17, 1972 to United States Lines, Inc. (on the Government's purchase of the S.S. UNITED STATES under the public Law), to Moore-McCormack Lines, Incorporated (on the sale of the S.S. ARGENTINA and the S.S. BRAZIL into foreign ownership, registry, and flag pursuant to the provisions of Public Law 92-296 and subject to its limitations), to American Export Isbrandtsen Lines, Inc. (on the sale of the S.S. CONSTITUTION into foreign ownership, registry, and flag pursuant to the same public Law), and to Prudential-Grace Lines, Inc. under the same Public Law.

It appears that the recommended decision of the Hearing Examiner, rendered April 12, 1972, would require repayments by Moore-McCormack of $759,704, by United States Lines of $3,243,865 and by American Export Lines of $22,373 and that Prudential-Grace would not be required to make any refund payment. The Maritime Subsidy Board of the Maritime Administration has not yet reviewed the recommended decision of the Hearing Examiner. Exceptions have been taken to the Hearing Examiner's report by both sides and the exceptions are still undetermined.

Meanwhile and wholly separately the Congress passed and the President approved Public Law 92-296, effective May 17, 1972. It provides for the disposition of laid-up passenger vessels which had been operated under operating differential subsidy contracts with the United States. The law provides that, except for the vessels INDEPENDENCE and UNITED STATES, the laid-up vessels may be sold and transferred to foreign ownership, registry and flag with the approval of the Secretary of Commerce provided, among other things, that the seller agrees with the Secretary that an amount equal to the net proceeds received from the sale in excess of existing obligations and incidental expenses shall within a year of receipt be committed to and thereafter used as equity capital to build new vessels which the Secretary determines are built to effectuate the purposes and policies of the Merchant Marine Act of 1936 as amended. Section 2 of the same Act authorizes the Secretary to purchase the UNITED STATES at depreciated cost less the unpaid principal and interest on the mortgage on the vessel for lay-up in the National Defense Reserve Fleet.

Plaintiff contends that since the amount ultimately possibly recoverable by the Government from the AGA

FBO steamship companies may rise as high as half a billion dollars if the Examiner's recommended decision is not adopted, the amounts of money coming into the hands of the steamship companies under the new legislation should, in effect, be impounded to secure the payments that the steamship companies might be required to make to the United States under the final decision.

The motion must be in all respects denied.

The payments being made are not payments of subsidies in respect of the periods during which the offensive conduct was continued. The only ground on which the motion can be made is that a sort of anticipatory execution should be issued to assure that, if the ultimate decision directs greater refunds of operating differential subsidy than the Examiner recommends, funds to pay the refunds will be at hand. However, there is no reason to frustrate the functioning of the statute involved. The evidence presented does not indicate that the ability of any of the steamship companies to respond will be worsened by carrying out the new statute according to its terms or that any of the steamship companies will be in a position to dissipate the funds. Only in the case of the amounts paid to the United States Lines does it appear that refunds will pass into the unrestricted possession of the steamship company. The evidence shows that United States Lines is abundantly solvent. Similarly the evidence is that Moore-McCormack and American Export Isbrandtsen Lines, Inc. are solvent and will be able to respond to any requirement that they make refunds of subsidy.

No reason appears why the plaintiff should be entitled at this time to relief which is based essentially on the

assumption that the Examiner's recommended decision is wrong and that the final decision will order vastly larger refunds. No such inference can be indulged to support an application for the relief of preliminary injunction. If that inference could be indulged, every other asset and every other pending receipt of any of the steamship companies could with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the Subsidy Board. The affidavit of the Assistant Secretary of the Maritime Subsidy Board and the Maritime Administration shows that withheld amounts of operating differential subsidy of the four steamship companies exceed the amounts of the Hearing Examiner's recommended refund except in the case of United States Lines, which according to the official records of the Maritime Administration has a net worth of $74,000,000.

Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under *qui tam* legislation. No statute authorizing a *qui tam* recovery or *qui tam* proceedings has been pointed to and the decision in *Connecticut Action Now, Inc.* v. *Roberts Plating Compayn, Inc.*, 2d Cir. 1972, Slip Opinion page 2253 makes it reasonably clear that the plaintiff has no *qui tam* interest in the Government's recovery under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227).

It is accordingly

ORDERED that the plaintiff's motions brought on by Orders to Show Cause dated May 4 and May 17, 1972, are in all respects denied.

Brooklyn, New York, June 6, 1972.

JOHN F. DOOLING, JR.,
U. S. D. J.

Appendix Q—Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Secretary of Commerce of the United States, AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL LINES, INC. and GRACE LINE, INC. (Now operating as "Prudential-Grace Lines, Inc.") and FARRELL LINES, INC., AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO., LYKES BROS. STEAMSHIP COMPANY, INC., MOORE MCCORMACK LINES, INC., and UNITED STATES LINES, INC.,
Defendants.

DOOLING, *D.J.*:

Plaintiffs move for an injunction *pendente lite*, against the Maritime Administration's disbursing to the defendant AGAFBO carriers any part of the $80,000,000 appropriated by the Second Supplemental Appropriation Act, 1971, for the fiscal year ended June 30, 1971 (PL 92-18, approved May 26, 1971). Of the $80,000,000 about half, $40,300,000, is appropriated to liquidate, in part, unpaid ship operation subsidies for the calendar year 1968 and earlier years the payment of which has been delayed by disagreements over the subsidy amounts due the carriers. $43,150,521.94 was disbursed on and between May 27,

1971 and June 11, 1971, when disbursement was arrested pending decision of the present motion, leaving about $36,850,000 undisbursed, but how much of each segment comprises a part of the $40,300,000 is not disclosed, perhaps is not quickly determinable. The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current-operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held-back amounts consisting of balance-amounts due only when finally determined and agreed upon between carrier and Administration. The Secretary of the Maritime Subsidy Board avers without contradiction that of the $43,150,521.94 already disbursed $9,819,000. is the amount paid to the defendant AGAFBO carriers as past-accrued operating subsidies due for the whole of the two calendar years 1965 and 1966 which, together, include the eleven months of the accused rate-reduction. Eleven twenty-fourths of that total is somewhat over $4,500,000. How much of the undisbursed $36,850,000 will become ascribable to past-accrued operating subsidies of the years 1965 and 1966 is not stated. The defendant carriers, it is said, have unpaid vouchers, still unaudited and unauthenticated, lodged with the Board in the aggregate amount of $62,702,765, all of which, if audited and allowed, could, self-evidently, not be paid out of the present appropriation.

The matter is urgent because the availability of the appropriated funds will end at June 30, 1971, and renewal of the appropriation would, it seems, have to await fresh budgetary and Congressional action.

Plaintiffs' central argument is that the present funds are not, within the meaning of the Court's decision, "cur-

rent subsidy payments" (432 F.2d at 140, col. 2) payment of which ought not be enjoined, but belong to the radically distinguished class of "payments . . . during the violation" (417 F.2d at 977, 432 F.2d at 140, col. 2), which, adventitiously, are found undisbursed and which, therefore, present afresh the, indeed, related but new question, should the Administration be required to withhold payment of an amount which the Administration may ultimately determine should not be paid because of the command of 46 U.S.C. § 1227, second paragraph ("Section 810")?

Most of the reasons urged for an injunction are not matters that would warrant judicial interference with the Administration's discharge of its responsibilities under the law as spelled out in the earlier decisions of the Court of Appeals, and an injunction could not be granted under the earlier decisions but for a differentiating feature here presented. It may have lurked in earlier determinations, but if so it was not brought forward recognizably.

Plainly enough, the issue here is differentiable from that which the Court determined on the injunction appeal. The dispositive difference is that before any disbursement is made that manifestly raises a substantial question under Section 810 there must be a specific and advertent decision by the Administration to make, to detain pending further review, or to refuse the payment. It is not a payment of past history presenting the question of whether in the light of all the circumstances the Administration should seek to recover money long since paid out and embedded in ship operations. The right to receive subsidy payments for the accused period is now directly in issue between the Administration and each affected carrier. The issue is whether, apart from the usually controlling earnings standards, etc., and in the

light of the Commission's decision under 46 U.S.C. § 814 ("Section 15..) and the congressional command of Section 810, the payment is due and should be made automatically.

There is no distinct evidence that the matter of disbursement has been considered in the light of determining before disbursement the propriety of making a payment entitlement to which depends on the resolution of a policy decision to be made under Section 810. The Board's letter of June 8, 1971, to plaintiff Safir rather indicates the contrary, in part because the plaintiff Safir's peremptory telegram of May 28, 1971, dealt with the whole $80,000,000 and with withholding, as offset, to secure the payment of any recovery that might be directed in proceeding S-243. Yet the Court of Appeals decisions plainly required that no payment be made without a prior advertent and adequate dealing with the policy matters bearing on payability.

Seen in this perspective the duty of the Administration is forthwith to make a decision of record based on stated grounds either to make payment (absolutely or conditionally), to withhold payment pending review, or to refuse payment of so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966.

In this analysis, which singles out for immediate rectification the apparent omission of an indispensable stage of judgmatical administrative action, the conventional standards for granting injunctive relief, viewed as an extraordinary equitable remedy, are largely if not entirely irrelevant.

It is, accordingly,

ORDERED that the defendants Andrew Gibson, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, James S. Dawson, Jr., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and Maurice Stans, Secretary of Commerce of the United States, are enjoined from paying to American President Lines, Ltd., Prudential Lines, Inc. and Grace Line, Inc. (Now operating as "Prudential-Grace Lines, Inc.") and Farrell Lines, Inc., American Export Isbrandtsen Lines, Inc., Bloomfield Steamship Co., Lykes Bros. Steamship Company, Inc., Moore McCormack Lines, Inc., and United States Lines, Inc., so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966, unless after a decision of record is made by the Maritime Administration on stated grounds to do so notwithstanding the determination of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13 under 46 U.S.C. §§ 814, 817, and the terms of 46 U.S.C. § 1227, or unless upon the taking of adequate stipulations and security measures for refunding that will assure that the issue whether the amounts should have been disbursed is determinable after payment exactly as if the whole decision-making process preceded the payment; and it is further

ORDERED that plaintiff give security in the amount of $5,000 conditioned as required by Rule 65; and it is further

ORDERED that the defendants' application for a stay is denied; and it is further

ORDERED that plaintiff's motion for injunction is in all other respects denied; and it is further

ORDERED that the denial of injunction, as set forth in the preceding decretal paragraph, is stayed until 2:00 P.M. June 24, 1971, and the defendant public officers are directed until then to continue the present voluntary stay of disbursements to the defendant carriers from the appropriated funds.

Brooklyn, New York, June 22, 1971.

JOHN F. DOOLING, JR.,
U. S. D. J.

Appendix R—Solicitor General's Brief, Dated August, 1970

No. 388

Supreme Court of the United States

OCTOBER TERM, 1969

MARSHAAL P. SAFIR ET AL., PETITIONERS

v.

ANDREW GIBSON ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE GOVERNMENT RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELHAUS,
Assistant Attorney General,

ALAN S. ROSENTHAL,
DANIEL M. JOSEPH,
Attorneys

Department of Justice,
Washington, D.C. 25939.

INDEX

certiorari was filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the determination of the Federal Maritime Commission that a shipping conference violated Section 15 of the Shipping Act, 1916, by setting unfairly low rates designed to, and which did, divert business from a non-conference carrier, required the Maritime Subsidy Board of the Maritime Administration to terminate the subsidies paid to the conference carriers under the Merchant Marine Act, pursuant to Section 810 of that Act.

STATUTE INVOLVED

Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

This is an action brought by Sapphire Steamship Lines, Inc., and two of its officers and stockholders, seeking to compel the Maritime Administrator and members of the Maritime Subsidy Board (a part of the United States Department of Commerce)[1] to take action pursuant to Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, against shipping companies which are members of a shipping conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO).

Sapphire began operations as an unsubsidized water carrier in March 1965, and undercut the rates of several carriers which were AGAFBO members. Shortly

[1] The functions now performed by the Federal Maritime Commission and by the Maritime Subsidy Board of the Maritime Administration were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the U.S.M.C. were transferred to the Federal Maritime Commission; an independent agency, and the U.S.M.C. functions relating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, a part of the Department of Commerce.

afterwards, AGAFBO reduced its rates on those routes on which its members competed with Sapphire. As a result, Sapphire lost business and subsequently went out of business in March 1967. It was adjudged a bankrupt in May of that year (Pet. App. 70a). On March 1, 1966, AGAFBO had raised its rates to their former levels.

After a broad investigation on its own motion of "virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes" (Pet. App. 2a), including the events outlined above, the Federal Maritime Commission issued a report (Pet. App. 22a-65a), concluding that (Pet. App. 53a-54a):

> [AGAFBO's] reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by its means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) [of the Shipping Act, 1916, as amended, 46 U.S.C. 817(b)(5)] and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire [footnote omitted]. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the [Shipping] Act. * * * We therefore conclude that the AGAFBO agreement operated in a manner which was in violation of section 15 [of the Shipping Act, 46 U.S.C. 814].

Shortly after the Commission issued this report, Sapphire wrote to the Maritime Subsidy Board requesting that subsidy payments to AGAFBO members be terminated and that action be instituted pursuant to Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, to recover subsidies paid since March 29, 1965, the date the AGAFBO carriers reduced their rates. The Board did not take action upon this request.

Sapphire then commenced this action in the district court, asserting that the AGAFBO carriers had violated Section 810 by the rate reductions which had driven Sapphire out of business, and that that Section required the Board to cut off any subsidies then being paid to any AGAFBO carriers and to start a legal action to recover those subsidies already paid after March 29, 1965, the date the tainted rate reductions went into effect (Pet. App. 86a-92a). The district court dismissed the complaint. The Second Circuit reversed, holding: first, that Sapphire and its owners had standing to question the Board's failure to seek recovery of subsidies pursuant to Section 810 (opinion of September 26, 1969, Pet. App. 70a, 77a); second, that Section 810 authorized the Board to withhold subsidy payments (or to recover back payments) only for the period during which a violation of the section was taking or had taken place (Pet. App. 77a); and, finally, that, with respect to the discretion of the Board to invoke Section 810, the Board "may not refuse to proceed against

the AGAFBO lines without at least considering the interest of the victim * * *. There may be other limits on [its] discretion, but we need not decide this now" (Pet. App. 78a-79a). The court remanded the case to the Board so that the latter could "give clear indication that it has properly exercised the discretion with which Congress has endowed it" (*ibid.*).

Upon remand, the Board started an administrative proceeding, on notice to all concerned parties, to determine whether Section 810 sanctions should be invoked against AGAFBO carriers (Pet. App. 20a). At this point, Sapphire moved in the district court for an injunction restraining the Board from making any further subsidy payments to the carriers. Sapphire claimed that the court of appeals had held that the Board was compelled to invoke Section 810, and that the carriers were not entitled to receive further subsidy payments until they had refunded the payments made during the seven-month period when AGAFBO's reduced rates had been in effect. The distract court denied this motion (Pet. App. 19a-21a), and Sapphire again appealed.

On this second appeal, the court of appeals (opinion of February 26, 1970; Pet. App. 7a-17a) upheld the district court's denial of an injunction (*id.* at 7a-8a), but held that the Commission's finding that the AGAFBO carriers had violated Sections 15 and 18(b)(5) of the Shipping Act had the effect of conclusively determining, for the purposes of the Maritime Subsidy Board's proceeding then in progress, that the AGAFBO carriers had violated Section 810 of the Merchant Marine Act. The court of appeals reached this conclusion on the basis of the similarity of the operative language of Section 810 to that of Sections 15 and 18(b)(5), and of the fact that

of the two agencies, the Commission rather than the Board "has the expertise to pass on whether rates are unfair or unduly discriminatory * * *" (Pet. App. 14a). But the court of appeals made it clear, in a footnote, that it was not requiring the Board to impose the Section 810 penalties upon the AGAFBO carriers (Pet. App. 17a, n. 2):

> Nothing we have said should be read as preventing the [Board] from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Shortly after this opinion was rendered, the AGAFBO carriers moved to intervene and petitioned the court of appeals for rehearing. After permitting intervention and obtaining further briefs from the parties, the court denied rehearing.[2] In an accompanying opinion (June 18, 1970; Pet. App. 1a-3a), the court again stressed that in its February 26, 1970 opinion, it had expressly refused

[2] The AGAFBO carriers had argued that the Commission's determination of their violation of Sections 15 and 18(b)(5) of the Shipping Act should not work a collateral estoppel in the Board proceedings, because the Commission made its determination after the violations had ceased. For that reason, the carriers asserted, they had no incentive to seek court review of the Commission's findings. The court rejected this argument, pointing out that the findings of Shipping Act violations had carried the possibility of $1000-per-day penalties, and that, indeed, the United States had later obtained settlements of claims based on the Sections 15 and 18(b)(5) violations of $25,000 from each offending carrier (Pet. App. 2a). The possibility of imposition of these penalties, the court held, provided sufficient evidence to seek review of the Commission's findings.

to hold that the Board was bound to invoke the Section 810 remedy against any of the AGAFBO carriers: "We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the [Board] * * *" (Pet. App. 3a).

ARGUMENT

The court of appeals' holding that the Maritime Subsidy Board was not obligated to invoke the Section 810 remedy on the basis of the Commission's finding of violation of Sections 15 and 18(b)(5) was correct. There is no conflict among the circuits as the decision below is the first appellate ruling construing Section 810. Furthermore, review of the decision below at this point is premature as the Board is presently in the process of determining whether to invoke Section 810 against the AGAFBO carriers.

1. Sapphire asserts in essence that *any* violation of Section 15 of the Shipping Act determined by the Commission automatically requires the Board to invoke the Section 810 penalties cutting off subsidies for the period of the violation. It is our basic position that the Board has discretion to determine whether and when to invoke Section 810 against particular carriers, even after the Commission has determined that Section 15 has been violated.

Section 15 allows the Commission to disapprove, cancel, or modify "any agreement [among members of a conference] * * * that it finds to be unjustly discriminatory or unfair as between carriers * * *." Such an agreement may violate the statute even though the resulting discrimination or unfairness was not willful. *Unapproved Section 15 Agreement-Coal to Japan/Korea*, 7 F.M.C. 295,

303-304. Furthermore, there is great flexibility in the civil penalty provisions of Section 15, which permits a penalty of "not more than $1000 for each day such violation continues * * *." 46 U.S.C. 814.

By contrast, the penalty created by Section 810 is inflexible as it bars all subsidy payments for at least the period of the violation. Although the violation here was willful, petitioner's argument would require that the Section 810 penalty be imposed for any violation of Section 15. There is no indication that Congress intended Section 810 to have such a harsh result; the legislative history discussed by the court of appeals suggests that this section was intended to cover only willful violations (Pet. App. 74a-75a). Even for such violations, the Board has discretion to determine whether, in light of the [3] basic policies underlying the Merchant Marine Act, the particular circumstances call for the termination of subsidy.

---

[3] That Act provides (46 U.S.C. 1101):

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping services on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizens personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

2. Review of the issue now would be inappropriate. The Board is conducting a proceeding to determine whether the Section 810 sanctions should be invoked here. Upon completing that action and making the "considered decision" directed by the court of appeals (Pet. App. 79a), the Board may invoke the remedy, thus rendering unnecessary further consideration of the issue pressed by Sapphire. Moreover, the record and Board decision will further illuminate the proper application of the statute. Finally, there is no showing that issue is sufficiently important to warrant review by this Court; the decisions below are the first reported appellate opinions on the point, even though the Merchant Marine Act of 1936 has been on the books for almost 35 years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
DANIEL M. JOSEPH,
Attorneys.

AUGUST 1970.

Appendix S—Opinion of the Court of Appeals on Petition for Rehearing, Dated June 18, 1969

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.
(Decided June 18, 1970.)
Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-MCCORMACK LINES, INC.; UNITED STATES LINES, INC.; AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRUDENTIAL GRACE LINES, INC.; and FARRELL LINES, INC.,
Intervenors.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

PER CURIAM:

In our decision of February 26, 1970, — F.2d —, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been seduously abstaining from participation, see 417 F.2d 972, 976 n.4 (1969); — F.2d at —, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see — F.2d at —, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of § 15 of the Shipping Act had expired and therefore could not longer be disapproved under § 18(b)(5). But § 15 subjects offending lines to a penalty of $1000 per day of violation. Since

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

the FMC's determination would be conclusive in a civil action for penalties, it was therefore clearly appealable. See *Pacific Far East Line, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, — F.2d at —, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under § 810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter *in limine*. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge implying that the FMC determination did *not* have binding effect, — F.2d at —, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided

in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemingly for the Maritime Administration to conclude that its sister agency had been wrong in a fuly litigated issue the decision of which Congress had confided to it." — F.2d at —, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the Maritime Administration; we said nothing about who was responsible for these and, by a footnote 2, emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains *open*.

The intervenors' petitions for rehearing are denied.

Appendix T—Order of the Court of Appeals Denying Rehearing En Banc, Dated June 18, 1970

34355

United States Court of Appeals

SECOND CIRCUIT

MARSHALL P. SAFIR, ARNOLD WEISSBERGER, and SAPPHIRE STEAMSHIP LINES., INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, et al.,

Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,

Intervenors.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for intervenors American Export Isbrandtsen Lines, Inc., et al., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD

....

Chief Judge

Appendix U—Letter From U.S. Department of Commerce, Maritime Administration, Washington, D.C. 20235, Dated May 20, 1970

Allan I. Mendelsohn, Esq.
Glassie, Pewett, Beebe & Shanks
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Mendelsohn:

Reference is made to your letter of May 4, 1970, requesting certain information respecting subsidy payments during the period March 30, 1965 through February 28, 1966, made to nine (9) specified shipping companies.

Please find attached (Attachment I) which furnishes the information requested in sub-paragraph (1) of your letter and Attachment II, which is responsive to sub-paragraph (2) of your letter.

In keeping with estabilshed User Fees, you are respectfully requested to submit a check in the amount of $50.00, made payable to 'Maritime Adm.-Commerce", to the undersigned to compensate for time spent in compiling the attached tabulations.

Sincerely,

James S. Dawson, Jr.
Secretary

Attachments

Attachment I

Department of Commerce—Maritime Administration
Cash Subsidy Payments Made to Selected Shipping Companies
in the Period March 30, 1965 Through February 28, 1966

Name of Company	*Operating-Differential Subsidies*	*Contruction-Differential Subsidies*	*Total Subsidies Paid*
American Export Isbrandtsen Lines, Inc.	$ 29,044,028.74	$ 344,685.73	$ 29,388,714.47
American President Lines, Ltd.	25,281,292.09	14,764,741.49	40,046,033.58
Bloomfield Steamship Company	1,384,187.53	—0—	1,384,187.53
Farrell Lines Incorporated	6,428,221.13	—0—	6,428,221.13
Grace Line, Inc.	17,213,156.03	20,120,297.83	37,333,453.86
Lykes Bros. Steamship Co., Inc.	20,017,353.25	25,702,958.78	45,720,312.03
Moore-McCormack Lines, Inc.	21,236,087.68	1,616,758.09	22,852,845.77
Prudential Lines, Inc.	2,161,538.61	7,533,671.67	9,695,210.28
United States Lines, Inc.	26,844,437.62	7,992,953.06	34,837,390.68
Totals	$149,610,302.68	$78,076,066.65	$227,686,369.33

Attachment II

STATEMENT SHOWING THE ESTIMATED AMOUNTS OF OPERATING-DIFFERENTIAL SUBSIDY AND CONSTRUCTION-DIFFERENTIAL SUBSIDY ACCRUED AND PAID TO THE SUBSIDIZED OPERATIONS LISTED BELOW DURING THE PERIOD MARCH 30, 1965 TO FEBRUARY 28, 1966

	ODS Subsidy (1)		CDS Subsidy (2)	
Subsidized Operator	*Amount Accrued*	*Amount Paid*	*Amount Accrued*	*Amount Paid*
American Export Isbrandtsen Lines, Inc.	$ 22,818,606	$20,828,845	$21,030,000	$ —
American President Lines, Ltd.	19,552,915	17,846,359	6,932,730	1,211,364
Bloomfield Steamship Company	775,157	699,071	—	—
Farrell Lines Incorporated	4,491,533	4,087,785	—	—
Grace Line, Inc.	11,599,660	10,611,741	—	—
Lykes Gros. Steamship Co., Inc.	13,306,076	12,196,526	—	—
Moore-McCormack Lines, Inc.	14,389,300	13,145,079	—	—
Prudential Lines, Inc.	1,771,554	1,612,898	—	—
United States Lines, Inc.	20,340,864	18,636,366	—	—
Totals	$109,045,665	$99,664,670	$27,962,730	$1,211,364

Notes:

(1) The estimated ODS accrual and payment figures represent the amounts applicable only to the period March 30, 1965 through February 28, 1966. These amounts the subject to adjustment after audit of domestic costs, the application of final rates thereto, and the audit and approval of final accountings for the period involved.

(2) The estimated CDS accural and payment figures represent the amounts applicable only to CDS contracts awarded during the period March 30, 1965 through February 28, 1966. These amounts are subject to adjustment for changes and extras and final contract audit.

Prepared by
Division of Subsidy Contracts
Office of Government Aid
Date May 7, 1970

Appendix V—Decision of Court of Appeals, Dated February 26, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.

(Argued February 13, 1970 Decided February 26, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Appellees.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and FEINBERG, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, denying an injunction against the defendants from making further subsidy payments to members of a steamship conference who had allegedly violated § 810 of the Merchant Marine Act of 1936. Modified and affirmed.

ISADORE B. HURWITZ, ESQ., New York, New York, *for Plaintiffs-Appellants.*

GILBERT S. FLEISCHER, Attorney, Admiralty & Shipping Section, Department of Justice, Washington, D.C. (William D. Ruckelshaus, Assistant Attorney General, Wash., D.C., Edward R. Neaher, United States Attorney, Eastern District of New York, Brooklyn, New York, and Louis E. Greco, Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice, of Counsel), *for Appellees.*

FRIENDLY, *Circuit Judge*:

This appeal is sequel to our decision in *Safir* v. *Gibson*, 417 F.2d 972 (1969), where we held that under § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, the Maritime Administration was "required to make a considered decision whether to recover the subsidies paid in the past" to member of AGAFBO who had been found by the Federal Maritime Commission (FMC) to have violated § 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814. Rates on U.S. Government Cargoes, Docket No. 65-13, 11 F.M.C. 263 (1967). After our decision was handed down, the Maritime Subsidy Board of the Maritime Administration initiated a proceeding, Docket No. S-243, on October 24, 1969, directing its chief hearing examiner to conduct an investigation and compile a public record "which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. § 1227), has been violated and the appropriate action that should be taken." Steamship lines that were members of

AGAFBO and received operating-differential subsidies during the period of the violations and the plaintiffs here were named as parties. Dissatisfied with this procedure, plaintiffs moved the District Court for the Eastern District of New York to issue an injunction restraining the defendants "from making any further payments of operating or construction differential subsidies to the members of AGAFBO which have violated Sec. 810 of the Merchant Marine Act, 1936" and to grant other appropriate relief. Judge Dooling denied the motion in all respects.

Insofar as the district court refused to enjoin current subsidy payments, its action was clearly consistent with our opinion, indeed compelled by it. We said we did not believe that § 810 protected "the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the path of virtue," and sharply distinguished making current payments to former violators from refusing to seek recovery of payments during the violation, 417 F.2d at 977. Plaintiffs do not charge that the AGAFBO members now receiving subsidy payments are violating § 810 or indeed that they have done so since March 1, 1966. The argument that these carirers will not have returned "to the path of virtue" until they have refunded all subsidy payments received during the period of violation is a far-fetched misreading of our decision.

On the other hand, while the district court was literally correct in its conclusion that we "did not find that Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810 . . .," the primary reason why we did not do the latter was that the question was not raised. We called attention to the failure of the AGAFBO lines to seek intervention and rather pointedly invited them to do so, 417 F.2d at 976 n. 4. Their decision to remain on the sidelines should not

prevent us from making a decision that will spare the plaintiffs the necessity of going through a costly and time-consuming redetermination of matters that have already been heard and decided by the agency having authority in the premises.

Section 810 of the Merchant Marine Act, 1936, makes it unlawful

> for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

Section 15 of the Shipping Act directs the Commission to disapprove any agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports . . . or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter . . ." Section 18(b)(5), 46 U.S.C. § 817(b)(5), added in 1961, 75 Stat. 764, directs the Commission to disapprove "any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." A finding by the FMC that the rates of the AGAFBO members were unjustly discriminatory or unfair as be-

tween carriers would thus determine the same conduct as would constitute a violation of § 810, subject only to proof that the AGAFBO lines were receiving operating-differential subsidies at the time and that the carrier adversely affected was a "citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established route from and to a United States port or ports.

When we turn to the discussion by the FMC in Docket No. 65-13, Rates on U.S. Government Cargoes, 11 F.M.C. 263, 279, 283 (1967), we find the following:

> We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act.
>
> Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was ac-

curate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir. 1954) cert. denied, 347 U.S. 990 (1954). We therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

The Commission's "Ultimate Conclusions" included, 11 F.M.C. at 287:[1]

2. AGAFBO's rates which were reduced to an admittedly noncompensatory and unreasonable

[1] Two of the four members who participated would have gone further and have held that AGAFBO's anticompetitive activities against Sapphire went beyond the scope of the conference agreement and violated § 15 on that ground, 11 F.M.C. at 288-90.

level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

The only basis we can perceive for arguing that the FMC's findings did not determine that AGAFBO's rates were "unjustly discriminatory or unfair" to Sapphire is that, rather than make an explicit finding to that effect, it chose to place decision on the ground that AGAFBO violated section 15 by knowingly and willfully setting rates which "were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act." But to rest anything on that would be hypertechnical. The reason why the rates were found to be "so unreasonably low as to be detrimental to the commerce of the United States" was because the reductions "were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade." 11 F.M.C. at 279. The FMC's refusal to find that the AGAFBO lines "conspired to drive Sapphire from the trade in violation of section 15," 11 F.M.C. at 282, and its fourth conclusion, "AGAFBO did not otherwise violate the Shipping Act," do not justify a contrary result. Section 810 is violated not only when an agreement by a sub-

sidized carrier is unjustly discriminatory or unfair to another American-flag carrier but when such carriers "engage in any practice in concert with another carrier or carriers by water" having that effect. While "practice" covers matters other than rates, see *California* v. *United States*, 320 U.S. 577 (1944), the framers of § 210 surely thought that the fixing of unjustly discriminatory or unfair rates aimed at an American-flag carrier pursuant to a conference agreement would constitute a "practice." See *Empire State Highway Ass'n* v. *F.M.B.*, 291 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 368 U.S. 931 (1961); compare *F.M.C.* v. *New York Terminal Conference*, 373 F.2d 424, 427 (2 Cir. 1967).

Since the AGAFBO lines and Sapphire were parties to the FMC proceeding and the FMC was there the authorized representative of the United States as the Maritime Administrator is in the case now pending, see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), any "privity" that may be required for giving the FMC's determination the effect of collateral estoppel in the Maritime Administration proceeding exists. The Supreme Court has recently observed that "language to the effect that res judicata principles do not apply to administrative proceedings . . . is certainly too broad" and that "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to en force repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). While the issues here may not have been purely factual, they were fully litigated before the agency designated to determine them. Cf. *Tampa Phosphate R.R.* v. *Seaboard Coast Line R.R.*, 418 F.2d 387, 396 (5 Cir. 1969). The Restatement of Judg-

ments, § 70, says that even determinations of questions of law are conclusive between the parties on a different cause of action unless injustice would result. The only possible injustice we can perceive from giving the FMC's determinations the effect of collateral estoppel in the Maritime Administration case arises from the fact that, in view of the relatively slight sanctions imposed in Docket No. 65-13, 11 F.M.C. at 288, namely, required modifications in the conference agreement, the AGAFBO carriers had no sufficient incentive to seek judicial review. However, the Commission's finding that AGAFBO violated section 15 of the Shipping Act subjected the member lines to a potential liability of $337,000 each under that section, and supplied ample motive for them to seek judicial review even if they did not anticipate the possible use of the FMC's conclusions in a subsequent Maritime Administration proceeding.

It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, cf. *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it, see 2 Davis, Administrative Law Treatise § 18.12 at 626 (1958). Any objection on the ground that two different statutes are involved, see *id.* § 18.04 at 576-80, is more than overcome in this case by the point that when Congress enacted § 810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. See 46 U.S.C. § 1111, Historical Note, and our earlier opinion, 417 F.2d at 975 n.2. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936.

The separation of functions in 1950, whereby authority on rate matters passed to what is now the Federal Maritime Commission, should not alter the result.

We recognize there is a general rule against judicial interference with administrative proceedings prior to the issuance of a final order, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *ABC Air Freight Co.* v. *CAB*, — F.2d —, — (2d Cir. 1969), slip opinions 183, 194-95. Nevertheless we believe two features of this case make it appropriate for us to direct conformity with our views on the preclusive effect of the FMC decision here and now. First, the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings. 2 Davis, Administrative Law Treatise § 18.12 (1958). If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably. Cf. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86-87 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). In this respect, a claim of *res judicata* differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation, as in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); and *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), an issue which Congress meant to be decided in the first instance by the agency itself.

SEC v. *Otis & Co.*, 338 U.S. 843, *rev'g* 176 F.2d 34 (D.C. Cir. 1949), is not the contrary. There the SEC, in the course of an investigation, had sought enforcement of a subpoena compelling an attorney to testify to conversations with a client, alleging that the evidence theretofore compiled amounted to a *prima facie* showing that the client had consulted the attorney for a fraudulent

purpose. The district judge found the evidence insufficient and denied enforcement. Subsequently the Commission announced its intention to determine whether the client's securities firms should be suspended or expelled from membership in the National Association of Securities Dealers because of its participation in the alleged fraud. The firm and the client, alleging that the Commission had no new evidence of fraud, sought a declaratory judgment that the prior determination was *res judicata* on the existence *vel non* of substantial evidence of fraud, and an injunction against the inquiry. The district court dismissed the complaint, the court of appeals reversed, and the Supreme Court reversed on the petition for certiorari in a brief *per curiam* citing the *Myers*, *Macauley*, and *Arkansas Power & Light Co.* cases, *supra*.

This case is clearly distinguishable. In *Otis*, all parties, appeared to agree, and we think correctly, that the SEC would not have been precluded by the prior determination if it had been able to come up with new evidence of fraud. Under the court of appeals holding, in order to avoid an injunction against the second proceeding, the SEC had to produce new evidence of fraud, the very matter which the proceeding was designed to discover. It would turn the administrative process on its head if, before the agency could make a determination, it had to convince a court that this would be supported by substantial evidence. Here, by contrast, the quantum of evidence to support or refute the FMC's determination is not relevant. The only issues are what that agency in fact determined and whether that determination is binding on the Maritime Administrator. The conclusions we have reached clearly follow from the face of the record and the relevant principles of statutory and administrative law.

There is a second feautre justifying judicial intervention at this stage. While the proceeding before the Mari-

time Subsidy Board is not being held pursuant to a court order, such an order surely would have issued under 28 U.S.C. § 1361 if the agency had not, by a timely compliance, made it unnecessary. If such an order had issued, the court would have had discretionary power to modify or clarify it if such actions appeared necessary because the agency misunderstood the nature of the proceeding required. Its power is no less because the agency willingly, if to some extent mistakenly, attempted to comply with the thrust of our prior decision before being ordered to do so.

We emphasize that the courts' power to clarify the nature of the proceeding which the agency must undertake does not mean that exercise of that power is necessary, or even appropriate, in every dispute that may arise over the manner in which the proceeding is being conducted. In most situations, the reasons for the normal exhaustion requirement will prevail over anything to be gained by immediate intervention. Here, however, there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberation without receiving proper instructions.

We therefore direct the district court to instruct the Maritime Administration not to redetermine the issue wheher the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire.[2] With this modification, the order denying an injunction is affirmed. No costs.

---

[2] Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Appendix W—Decision of Court of Appeals, Dated September 26, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 571/2/3—September Term, 1968.

(Argued June 2, 1969 Decided September 26, 1969.)

Docket Nos. 33389/90/91

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

Appellees.

Before:

WATERMAN, FRIENDLY and KANFMAN,

Circuit Judges.

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, dismissing a complaint by an American-flag steamship company and two of its officers and stockholders seeking a declaratory judgment and an order compelling the Maritime Administration to recover subsidies already

paid and to cease further payments to members of a conference found by the Federal Maritime Commission to have engaged in predatory tactics to destroy competition on the part of plaintiff steamship company. Reversed and remanded.

ISADORE B. HURWITZ, New York, N.Y., *for Plaintiffs-Appellants.*

DANIEL JOSEPH (William D. Ruckelshaus, Assistant Attorney General; Vincent T. McCarthy, United States Attorney; Alan S. Rosenthal, Attorney, Dep't of Justice, Washington, D.C.), *for Appellees.*

FRIENDLY, *Circuit Judge*:

The plaintiffs in this action are Sapphire Steamship Lines, Inc., and two of its officers and stockholders. In March, 1965, Sapphire began operations as an unsubsidized common carrier by water, undercutting the rates of various carirers which were members of a conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO). Shortly thereafter, on March 29, 1965, AGAFBO drastically reduced its rates to an admittedly unfair, unreasonable and noncompensatory level. As a result of this reduction, Sapphire was deprived of cargo which was indispensable to its profitable operation. Some eleven months later, on March 1, 1966, AGAFBO raised its rates to their former levels. Sapphire went out of business in March of the following year and was adjudged a bankrupt that May.

On December 12, 1967, the Federal Maritime Commission issued a report, Docket No. 65-13, on the result of an investigation "of virtually the entire spectrum of the U.S. military cargoes," in which AGAFBO was a re-

spondent. The Commission concluded that "the drastic reductions [in AGAFBO's rates] were designed for but one purpose, the elimination of Sapphire from the carriage of military cargo" by unfair competition, and thus were "so unreasonably low as to be detrimental to the commerce of the United States and contrary to the public interest as well." The Commission found that by willfully setting its rates at this level AGAFBO violated § 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814.[1]

Counsel for Sapphire promptly wrote the Acting Maritime Administrator and the Maritime Subsidy Board requesting that subsidy payments to members of AGAFBO be terminated and that action be instituted to recover subsidies paid since March 29, 1965, the date AGAFBO reduced its rates.[2] The request was based on § 810 of the

---

[1] The commission elaborated on its finding as follows:

> AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. (Footnote omitted.)

Two of he four Commissioners who participated in the report would also have found that the members of AGAFBO engaged in a conspiracy to drive Sapphire out of the trade.

[2] The functions now performed by the Federal Maritime Commission and by the Maritime Administration and its Subsidy Board were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the United States Maritime Commission were transferred to the Federal Maritime Commission, an independent agency, and the functions relating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, an agency within the Department of Commerce.

Merchant Marine Act, 1936, 46 U.S.C. § 1227, which provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The Secretary of the Subsidy Board answered that the Board would "take whatever action it deems appropriate in keeping with the provisions of the Merchant Marine Act of 1936, as amended." Similar letters written after expiration of the time to appeal from the FMC's decision

received a similar noncommittal reply. In fact, the Maritime Administration has taken no action whatever.

Plaintiffs thereupon instituted this suit in the District Court for the Eastern District of New York against the Acting Maritime Administrator, the Secretary of the Subsidy Board, and the Secretary of Commerce. The complaint alleged substantially the foregoing facts and sought a declaration that § 810 barred subsidy payments to the AGAFBO lines and an order compelling defendants to stop such payments and to take appropriate legal action to recover subsidies paid since March 29, 1965. Federal jurisdiction was sufficiently predicated on 28 U.S.C. § 1337, which gives the district courts jurisdiction over any actions arising under any Act of Congress regulating commerce, cf., *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F.2d 222, 226-27 (2d Cir. 1962), vacated on other grounds sub nom. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and 28 U.S. § 1361, which gives the district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." [3] On defendants' motion the complaint was dismissed for failure to state a claim on which relief could be granted.[4] The plaintiffs have appealed.

---

[3] We thus need not consider the mooted question whether § 10 of the APA, 5 U.S.C. §§ 701-04, constiuttes an independen basis for federal jurisdiction. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 326-31 (1967).

[4] The defendants also moved to dismiss the complaint for improper venue and for failure to join indispensable parties, or, in the alternative, for a transfer to the District Columbia under 28 U.S.C. § 1404(a). The court below found it unneces-

[Footnote continued on following page]

Two major issues are presented: Whether plaintiffs have standing to sue, and if so, to what extent the acts complained of are unreviewable because they are committed to agency discretion. Neither question can be answered without a close examination of the statute to determine what interests it was designed to protect and how it was designed to protect them. It is unfortunate—though not surprising—that § 810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statutory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it.

At the outset we must reject the suggestion of the district court that because the statue is difficult to interpret, its interpretation is a matter entirely within the agency's discretion. As Professor Jaffe has said, "Discretion . . . is not self-defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts which must define its scope and its limit." Jaffe, Judicial Control of Administrative Action 572 (1965). We deal here with an issue requiring recon-

sary to pass on these points in view of its holding that the complaint failed to state a cause of action.

While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence "may . . . as a practical matter impair or impede" their ability to protect their interests in the subject matter of his litigation. F.R. Civ. P. 19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention.

ciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy payments and the direction of § 810 for withdrawal of those subsidies when they are used to hurt rather than help. "The question in each case of consistency with statutory purpose is addressed to the judge." *Id.* at 575.

The Merchant Marine Act, 1936, §§ 501-610, 49 Stat. 1995, provided a new method of subsidizing American-flag shipping, primarily by construction-differential and operating-differential subsidies. In the course of debate, Senator O'Mahoney of Wyoming and Senator Clark of Missouri brought up the case of a subsidized American-flag line which by a conference agreement with foreign lines was "crushing out of existence an American line which enjoys no subsidy." The victim had assured the committee that "without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line, . . . [it] could compete with all the lines of the world." 80 Cong. Rec. 9921 (1936). Senator O'Mhaoney asked Senator Copeland of New York, who was in charge of the bill:

> Would it not be a simple matter to provide by amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangemnt to destroy any other American line? *Id.* 9922.

Senator Copeland undertook to "consult the experts and see if they can choose language to cover what the Senator has in mind." *Id.* The next day Senator O'Mahoney offered as an amendment what became § 810. After referring to the evil "of paying a subsidy to an American line which was in truth and fact engaged in a conspiracy with foreign lines to discriminate against another Amer-

ican line," he stated, more broadly, that the amendment would "make it clear to the [United States Maritime] Commission that it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, to crush American competition."[5] He added:

> In order to give an opportunity to those who may be injured by illegal combinations of the kind I have described to protect themselves I have incorporated in this amendment the principle of section 4 of the Clayton Act which permits the victim of such unfair practices to sue for treble damages.

Senator Copeland made no objection and the amendment was adopted. 80 Cong. Rec. 10075-76 (1936).

The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable byproduct. The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the Administrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. Recovery of such payments imposes an added cost on the violators and

[5] Apart from the language of § 10 itself, this statement answers defendants' contention that the statute is inapplicable here because AGAFBO was composed solely of American lines.

thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him.[6] Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit this under the subsidy contract in the absence of a statutory prohibtion, and we find no such prohibition here. On the other hand, we do not believe that § 810 protects the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the paths of virtue. In fact, we do not think § 810 even authorizes the Administrator to take such a step. So far as concerns payments, as distinguished from recoveries, the statute is mandatory, where applicable, contrast §§ 606(1), 806(c), 46 U.S.C. § 1176(1), 1228, and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American merchant marine.

Construing the statute as we do, we think Sapphire has standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Since we find that § 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past, it follows that this interest is legally protected, see *Hardin* v. *Kentucky Utilies Co.*, 390 U.S. 1, 5-7 (1968), and that disre-

[6] The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion.

gard of it is a "legal wrong" within the meaning of § 10 (a) of the Administrative Procedure Act, 5 U.S.C. § 701. While Sapphire is not presently competing with the AGAFBO lines, we deem that irrelevant in the circumstances of this case. Sapphire was forced out of business by the violation of § 810, and plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by § 810, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the protection of § 810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.[7]

The Government contends that even if plaintiffs have standing, the Administrator's faliure to act is a matter within his sole discretion and therefore neither reviewable under § 10 of the APA, 5 U.S.C. § 701(a)(2), nor the proper subject of an order in the nature of mandamus, cf. 28 U.S.C. § 1361.[8] The arguments come to the same

[7] 28 U.S.C. § 1361 speaks of "a duty to the plaintiff" rather than of a "legal wrong." The quoted language, proposed by the Department of Justice, was accepted by the sponsors of the legislation as incorporating the law on the availability of mandamus. We think that under a rational law of mandamus such an order is available to anyone entitled to review under § 10(a) of the APA and seeking affirmative official action. See generally Byse & Fiocca, *supra*, note 3 81 Harv. L. Rev. at 316, 320.

[8] The Government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of

[Footnote continued on following page]

thing and we reject them both. While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited. Cf. *Americacn Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1969); *Moore-McCormack Lines, Inc.* v. *United States*, 38 U.S.L.W. 2112 (Ct. Cl. July 16, 1969) Specifically, he "may not refuse to proceed against the AGA FBO lines without at least considering the interest of the victim, about which Congress was so concerned. There may be other limits on his discretion, but we need not decide this now. If plaintiffs' allegations are true, the Maritime Administration was at least required to make a considered decision whether to recover the subsidies paid in the past. *An answer will reveal whether it has done this and, if so, whether on grounds consistent with the statute.* For the present we ask only that the Maritime Administration give clear indication that it has properly exercised the discretion with which Congress has endowed it. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)."

The order dismissing the complaint for failure to state a claim on which relief can be granted is reversed and the cause is remanded for further proceedings consistent with this opinion.

specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which § 810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States.

Appendix X—JOURNAL OF MARITIME LAW AND COMMERCE Vol. 2—No. 1—October 1970

***NOTES ON RECENT CASES*:**

COMPETING CARRIER HAS STANDING TO QUESTION ADMINISTRATOR'S FAILURE TO RECOVER SUBSIDIES PAID TO INDIVIDUAL CONFERENCE CARRIERS DURING PERIOD OF VIOLATION OF SECTION 810 OF MERCHANT MARINE ACT. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).

FEDERAL MARITIME COMMISSION DETERMINATION THAT CONFERENCE RATES WERE UNJUSTLY DISCRIMINATORY OR UNFAIR TO COMPETING CARRIER IS BINDING ON MARITIME ADMINISTRATOR IN DETERMINING WHETHER TO RECOVER SUBSIDIES PAID IN PAST. *Safir* v. *Gibson*, 000 F.2d 000, *reh. den.* — F.2d — (2d Cir. 1970).

The recent litigation involving the Sapphire Steamship Lines, Mr. Marshall Safir and certain United States flag steamship lines demonstrates for the first time the potential of section 810 of the 1936 Merchant Marine Act [1] for regulating the practices of subsidized United

[1] 49 Stat. 2015, 46 U.S.C. 1227. Section 810 provides as follows:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indicetly out of funds of the United States or any

[Footnote continued on following page]

States lines operating under conference agreements. The interrelationship of the various opinions rendered in the course of this litigation can best be appreciated by a presentation of the decisions in the order in which they rendered. On May 6, 1965, the Federal Maritime Commission (FMC) instituted, on its own motion, an investigation of what it later described in its report as "virtually the entire spectrum of circumstances surrounding the procurement of ocean transportation of U.S. military cargoes." [2] Among the respondents named by the Commission were Sapphire Steamship Lines, Inc. (Sapphire), the Atlantic and Gulf American-Flag Berth Operators (AGAFBO), and its member lines.[3] Sapphire was an

> agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The legislation proposed to implement the President's new maritime program would not make any substantive amendments to section 810. S.1915, 919st Cong., 1st Sess. (1969); H.R. 15424, 91st Cong., 1st Sess. (1969).

[2] 11 F.M.C. 263, at 264.

[3] The AGAFBO member lines, as listed in the FMC report, were: Alcoa Steamship Company, Inc., American Export Isbrandtsen Lines, Inc., American President Lines Ltd., American Union Transport, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Farrell Lines Incorporated, Grace Lines Inc., Great Lakes Bengal Lines, Inc., Isthmian Lines, Inc., Lykes Bros. Steamship Co., Inc., Matson Navigation Company, Moore-McCormack Lines, Inc., Pacific Seafarers, Inc., Prudential Steamship Corporation, States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), T. J. Stevenson & Co., Inc. (Stevenson Lines), United States Lines Company, Waterman Steamship Corporation.

unsubsidized carrier, operating a liner service between United States North Atlantic ports and ports in the United Kingdom and the Bordeaux-Hamburg range.[4] AGAFBO was a conference, composed solely of American flag carriers, approved under section 15 of the Shipping Act of 1916.[5] Through AGAFBO, the member carriers agreed upon rates, terms and conditions to be used as a basis for negotiation with the various military shipping agencies for the transportation of military cargoes.[6]

Sapphire was founded for the specific purpose of engaging principally in the carriage of military household goods.[7] The intent was to structure its service and rates so as to offer more economical carriage than the AGAFBO carriers, while operating at a profit. As one of the measures taken to protect its market from the competition offered by Sapphire, AGAFBO reduced its rates drastically to a level competitive with Sapphire's. At the time AGAFBO stated that the reductions were temporary and for competitive purposes only, and that the revised rates were not fair, reasonable nor compensatory.[8]

When the FMC instituted the proceeding, it announced that the following were among the legal questions to be resolved:

> 1. Whether the conference agreements have operated in a manner which is unjustly discriminatory or unfair to the U.S. Government or to any of its shipping agencies or between carries or has operated to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of the Shipping Act; and whether the agreements should be modified or canceled pursuant to the standards of section 15.
>
> 6. Whether the rates on Government cargo filed by AGAFBO, Waterman, or Sapphire are so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5).
>
> 7. Whether the member lines of AGAFBO have individually or together with other lines acted to exclude any other carrier from the carriage of Government cargo in violation of section 14 Second.
>
> 8. Whether any respondent member of AGAFBO has violated section 14 Third by retaliating against any shipper (U.S. Government) by refusing, or threatening to refuse, space accommodations when such are available, or resort [sic] to other discriminatory or unfair methods, because such shipper (U.S. Government) has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.[9]

In his decision, the examiner concluded that the normal AGAFBO rates were not unreasonably high and went on to find that when AGAFBO reduced its rates to deprive Sapphire of cargo, AGAFBO's rates became so

[4] 11 F.M.C. at 265.

[5] 39 State. 733: as amended, 46 U.S.C. 814; 11 F.M.C. at 264-265.

[6] 11 F.M.C. at 265. *See generally* Lowenfeld, "To Have One's Cake . . ."—The Federal Maritime Commission and the Conference, 1 J. Mar. L. & Comm. 21 (1969).

[7] 11F.M.C. 270.

[8] Id. at 269, 274-275. The range of tactics used by AGAFBO is set out in the FMC Report. Id. at 272-277.

[9] Id. at 277.

low as to be detrimental to commerce.[10] As to Sapphire, the examiner noted its losses, but held that it was entitled to a reasonable trial period of operation in which to stabilize its rates.[11] However, the examiner concluded that the rate issues were moot, since the rates were no longer in effect.[12]

Exceptions were taken to the examiner's decision. The Government challenged the examiner's consideration of the reasonableness of the rates on the basis that the cost data presented by the conferences were unreliable. AGAFBO asserted that the data were complete and reliable.[13] The FMC upheld the examiner's decision in this regard. It then found that AGAFBO's reduced rates "were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo . . ." and "were so unreasonably low as to be detrimental to the commerce of the United States." [14] The decision went on to state that:

> The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which

[10] Id. at 278. *See* 75 Stat. 764, 46 U.S.C. 817(b) which provides:

> (5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

[11] 11 F.M.C. at 278.

[12] Id.

[13] Id. at 279.

[14] Id. at 279.

> was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. (citation omitted) We, therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.[15]
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.[16]

[15] Id. at 283.

[16] Id. at 287.

Two of the four participating commissioners filed a separate opinion in which they expressed the view that, in addition, AGAFBO violated section 15 of the Shipping Act "by conspiring to destroy the competition of Sapphire." [17]

Subsequently, Sapphire, which had gone out of business and was adjudged a bankrupt, took the offensive by commencing a civil action against AGAFBO members, under Scetion 810,[18] to recover treble damages. In addition, it wrote to the Acting Maritime Administrator and the Maritime Subsidy Board requesting that, in accordance with section 810, subsidy payments to members of AGAFBO be terminated and that action be instituted to recover subsidies paid since the date AGAFBO reduced its rates.[19] The Maritime Administration took no action.[20]

Sapphire and two of its officers and shareholders then brought suit to compel the Administrator both to cease paying subsidies to members of AGAFBO and to recover from the carriers all subsidies improperly paid to them.[21] As noted in this Journal,[22] the district court dismissed the action, holding that a competing carrier does not have

[17] Id. at 288-290.

[18] Supra note 1.

[19] *Safir* v. *Gibson*, 417 F.2d 972, 975 (2d Cir. 1969).

[20] Id.

[21] *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y. 1969), *rev'd sub nom. Safir* v. *Gibson*, *supra* note 200. Plaintiffs couched their petition for relief in terms demanding cessation and recovery of both construction and operating-differential subsidies. The opinions discussed herein mention "subsidies" without differentiation. However, the statutory language, supra note 1, and the legislative history, 80 Cong. Rec. 9922 make it clear that all subsidies fall within the statutory prohibition. *See* 417 F.2d at 976-977.

[22] 1. J. Mar. L. & Comm. 345 (1970).

standing to require the Maritime Administration to terminate the offending carrier's subsidies.[23] The court also held that mandamus would not lie, because the acts of the administrator were discretionary, and required interpretation of a statute of some difficulty and the evaluation of the conduct of each of the subsidized members of the conference. The court noted that the FMC decision did not consider the role of each AGAFBO carrier.[24]

The Second Circuit Court of Appeals reversed.[25] Since section 810 does not expressly provide for cases where the Administration refuses to take steps concerning subsidy payments to violators, the court analyzed the legislative history of the Merchant Marine Act. It found that the primary concern manifested in the history of section 810 was with the added burden which subsidies impose on the competitive position of the victim of unfair or discriminatory practices.[26] The court also found that such concern extends to the interest of a former victim in the recovery of subsidies improperly paid to carriers which are still his competitors.[27] Since section 810 was intended to protect the interests of the competitors of subsidized carriers, such

[23] 297 F. Supp. at 633.

[24] 297 F. Supp. at 633-634.

[25] Supra note 20.

[26] 417 F.2d at 977.

[27] Id. The court noted that plaintiff Safir had stated in an affidavit that he desired to return ot the shipping business as soon as possible. Id. at 978.

The general tenor of the legislative history indicates that section 810 was probably intended to prevent subsidized United States carriers from combining with foreign flag carriers to force other United States carriers out of the trade. However, the language of the statute and some specific parts of the legislative history, 80 Cong. Rec. 10076, would not justify such a narrow construction.

persons were held to have standing to seek judicial review of administrative disregard for their welfare.[28]

The court refused to find that the statute barred former violators "from ever receiving subsidy payments despite their return to the paths of virtue," but held that the Administrator could recover subsidies improperly paid during the period of violation.[29] It noted that:

> Recovery of such payments poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him. (footnote omitted) Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit this under the subsidy contract in the absence of a statutory prohibition, and we find no such prohibition here.[30]

The court further stated that, while the Maritime Administrator has some discretion regarding the recovery of

[28] 417 F.2d at 977-978. In so holding the court disregarded *Isbrandtsen Co.* v. *Federal Maritime Board,* 159 F. Supp. 884 (D.C.D.C. 1958). In that case, the court held that section 810 did not confer any right which a competitor was entitled to protect by suit against the Government or its officials. The right to recover treble damages was regarded as the competitor's sole remedy. In the present case, the court took the view that section 810 was intended to protect against competitive injury, and hence, conferred a legally protected right within the rule stated in *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968). The court specifically rejected the proposition that the provision for treble damages implied an absence of any other remedy. 417 F.2d at 978.

[29] 417 F. 2d at 977.

[30] Id.

past subsidies, "he may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim, about which Congress was so concerned."[31] Accordingly, the court held that "the Maritime Administrator was at least required to make a considered decision whether to recover the subsidies paid in the past."[32] It indicated that such requirement would be satisfied by an answer from the Administration showing that it had made such a decision and on grounds consistent with the statute.[33] The case was remanded to the district court for further proceedings consistent with such decision.

After the Court of Appeals had rendered its decision, the Maritime Subsidy Board, declaring its purpose to be to avoid further delay in its consideration of the matter, issued an order[34] requiring the Chief Hearing Examiner or his designee to conduct an investigation and ". . . compile a public record which will provide a basis for recommending to the Maritime Subsidy Board *whether* section 810, Merchant Marine Act, . . . has been violated and the appropriate action that should be taken." (Emphasis added.)[35] Sapphire and the subsidized members of AGAFBO were named as parties.

Following the issuance of this order, Sapphire moved in the district court for an injunction to restrain the Administrator from making any further subsidy payments to the AGAFBO lines.[36] The crux of Sapphire's argu-

[31] Id. at 978.

[32] Id.

[33] Id.

[34] Investigation into Alleged Violation of Section 810, Merchant Marine Act, 1936, as Amended, Docket No. S-243.

[35] Id at 3.

[36] *Safir* v. *Gibson,* — F. Supp. — (Docket No. 68 C 643, E.D.N.Y., Dec. 9, 1969).

ment was that the FMC decision had established a violation of section 15 of the Shipping Act and, hence, of section 810 of the Merchant Marine Act. Accordingly, it was argued, subsidy payments had to cease immediately.[37] Sapphire also argued that the Maritime Subsidy Board had disregarded the decision of the Court of Appeals by initiating an investigation in order to compile a record upon which the Board would determine *whether* section 810 had been violated.[38]

The district court denied the motion.[39] In doing so, it stated that the Court of Appeals had interpreted the Act as prohibiting subsidy payments only so long as the Section 810 violation continued, and had not held that the AGAFBO members were currently in violation.[40] It further stated that the Court of Appeals concluded neither that section 810 had been violated, nor that a finding of a violation of section 15 of the Shipping Act automatically amounts to a finding of a violation of section 810 of the Merchant Marine Act.[41]

Sapphire appealed this decision[42] and, on February 13, 1970, the Court of Appeals directed the district court to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low

[37] Id. at —.

[38] Id.

[39] Id. at —.

[40] Id. at —. *See* 417 F.2d 977.

[41] Supra note 34, at 3.

[42] Safir v. Gibson, — F.2d — (Docket No. 34355, 2d Cir., Feb. 26, 1970) (Slip opinions at 1697).

level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire.[43]

The Court of Appeals reasoned that if a rare agreement is unjustly discriminatory or unfair as between carriers in the context of section 15 of the Shipping Act, the same agreement must be unjustly discriminatory or unfair in the context of section 810 of the Merchant Marine Act. It quoted at length from the FMC report[44] and concluded that the FMC had in fact found that AGAFBO's rates were "unjustly discriminatory and unfair" to Sapphire.[45] It rejected as "hypertechnical" the Government's argument that the FMC had not found unlawful discrimination but had simply concluded that AGAFBO had violated section 15 by knowingly and willingly setting rates which "were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act."[46] The court pointed out that "[t]he reason why the rates were found to be 'so unreasonably low as to be detrimental to the commerce of the United States' was because the reductions were 'admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade.'"[47]

[43] Id. at — (Slip opinions at 1709). The order denying the injunction was otherwise affirmed. Id. The court specifically approved the district court's interpretatoin of that aspect of its decision on the first appeal which concerned the lack of authority for withholding current payments from former violators. Id. at — (Slip opinions at 1699).

[44] Id. at — (Slip opinions at 1701-1703).

[45] Id. at — (Slip opinions at 1703).

[46] Id. at — (Slip opinions at 1703-1704).

[47] Id.

The FMC's refusal to find a conspiracy to drive Sapphire from the trade was not regarded as requiring a different result. In the court's view, no "agreement" violating the statute was necessary, since the fixing of unjustly discriminatory or unfair rates would constitute a "practice" violating section 810.[48]

The court then applied *res judicata* principles and held that since the AGAFBO carriers and Sapphire were parties to the FMC proceedings, and since the FMC in that proceeding and the Maritime Administrator in the pending investigation were the authorized representatives of the United States, sufficient privity existed to justify giving the FMC's determination collateral estoppel effect in the Maritime Administration proceeding.[49] The court considered the issues in question to have been fully litigated before the agency designated to determine them, and regarded such decision as conclusive between the parties where the same issue arise in relation to a different cause of action.[50] It further justified its conclusion by

[48] Id. at — (Slip opinions at 1703-1704).

[49] Id. at — (Slip opinions at 1704). A recent study concluded that while *res judicata* is operative in administrative proceedings, the doctrine is more frequently circumvented than utilized. *See generally* Kelley and Milner, Res Judicata and Administrative Jurisdiction—A Proposal for Resolving Conflicts Between Agencies with Overlapping Jurisdiction, 35 G.W.L.R. 1056 (1967). Questions of public interest and policy make a determination of the extent to which *res judicata* applies to administrative proceedings particularly troublesome where different statutes are involved. *See generally*, Groner and Sternstein, Res Judicata in Federal Administrative Law, 39 Iowa L.R. 300 (1954); Davis, Res Judicata in Administrative Law, 25 Texas L.R. 199, at 214 (1947); Kleinfeld and Goding, Res Judicata and Two Coordinate Federal Agencies, 95 U. Pa. L.R. 388 (1947).

[50] — F.2d — (Slip opinions at 1705).

pointing out that the FMC rather than the Maritime Administration has the expertise necessary to determine whether rates are unfair or unduly discriminatory and that it would be "unseemly" for the Maritime Administration to conclude that the FMC's determination was wrong.[51] The fact that two different statutes were involved was regarded as unimportant because, at the time Congress enacted section 810, the Merchant Marine Act and the Shipping Act were administered by the same agency—the United States Maritime Commission.[52] The fact that the same agency originally administered both acts was considered to bolster the conclusion that what

[51] Id. The court justified its intervention in the administrative proceeding prior to the issuance of a final order on two grounds. Noting that principles of *res judicata* are applied to administrative proceedings to protect a successful party from being vexed with needlessly duplicitous proceedings, the court pointed out that of its nature such interest can be protected only at the outset of the second proceeding. — F.2d — (Slip opinions at 1706). The court noted that its decision would "spare the plainitffs the necessity of going through a costly and time consuming redetermination of matters hat have already been heard and decided by the agency having authority in the premises." Id. at —; (Slip opinions at 1700). Secondly, the court pointed out that by its timely compliance with the decision in the first appeal the Maritime Subsidy Board had made it unnecessary for the court to issue an order compelling the Administrator to take action.

> "If such an order had issued, the court would have had discretionary power to modify or clarify it if such action appeared necessary because the agency misunderstood the nature of the proceeding required. Its power is no less because the agency willingly, if to some extent mistakenly, attempted to comply with the thrust of our prior decision before being ordered to do so."

Id. at — (Slip opinions at 1708).

[52] Id. at — (Slip opinions at 1706).

was unjustly unfair and discriminatory under the Shipping Act was likewise under the Merchant Marine Act.[53]

In a footnote, the court pointed out that its determination, i.e., that violation *vel non* by AGAFBO was no longer an open question, should not be taken as preventing the Maritime Administration from investigating the "'nature and extent" of the individual carriers' participation in the illegal action, if such was relevant to a determination of whether to seek recovery of payments improperly made.[54]

Until this point, the AGAFBO carriers had not taken any part in the court proceedings, despite the fact that the Court of Appeals "rather pointedly invited them to do so."[55] Now, however, they sought to intervene in order to petition for a rehearing on the issue of the collateral estoppel effect of the FMC decision. The court granted leave, but denied the petition for rehearing.[56] In its opinion, it reaffirmed its holding that the decision of the FMC regarding the nature of the AGAFBO rates was conclusive on the Maritime Administration.[57] It again pointed out that the Administration was free to make determinations as to the "nature and extent" of the participation of individual carriers in the illegal action.[58]

---

[53] Id.

[54] Id. at — (Slip opinions at 1709). The effect of an individual carrier's active participation, or lack of it, depends on the form which the violation takes. It is a violation of section 810 to "continue as a party to . . . any agreement" which violates the Act. Supra note 1. Hence, lack of active participation would be irrelevant if the non-participating carrier remained a party to a prohibited agreement.

[55] Id. at — (Slip opinions at 1700).

[56] *Safir* v. *Gibson*, —F.2d— (Docket No. 34355, 2d Cir., June 18, 1970).

[57] Id. at —.

[58] Id.

It also stated that the Administration was not prevented from investigating and concluding that AGAFBO had conspired to drive Sapphire from the trade, since the FMC had failed to reach a majority position on that issue.[59]

Taken together, the three Court of Appeals' opinions have created a significant body of law in an area where there was very little before. The decisions can be taken as authority for a number of propositions regarding section 810. At the same time, however, these propositions also raise many new questions. For example, a competitor/victim's remedies are not limited to the recovery of treble damages. At least in the Second Circuit, he clearly has standing to compel the Maritime Administrator to invoke the administrative sanction provided in section 810. But, query, whether any other category of "person who shall be injured in his business or property by reason of anything forbidden by" section 810 has a like remedy? The reasoning of the Second Circuit would extend such right only to persons with a *present competitive* interest.

The court indicated that an interruption of operations caused by the violation will not deprive the victim of standing where he intends to return to the shipping business as soon as possible. Whether a potential competitor or a former victim who has decided to abandon the shipping business would have the required interest is still undecided. However, it would appear that depriving a victim, who has been completely driven out of the shipping business, of standing would reward the more effective and ruthless violators.

If a carrier is currently in violation, application of the statute is mandatory. However, a carrier who violates section 810 is not permanently debarred from receiving

---

[59] Id. at —.

subsidy payments; the Administrator lacks the power to withhold current payments from a carrier who has returned to the "paths of virtue." On the other hand, the Administrator has the authority to recover payments improperly made while the subsidized carrier was in violation of section 810. But, the opinions give little guidance as to how and when the "return to the path of virtue" is accomplished. The court quite clearly found that a carrier is not barred from receiving current subsidies because it has not repaid payments improperly made during the violation. There is also a strong inference that a carrier can be regarded as "returned to the paths of virtue" despite its continued enjoyment of the competitive advantages gained by violating the Act. On the other hand, it is questionable whether as a matter of policy the violation should be deemed to have ceased when the discriminatory rates went out of effect. Should the fact that AGA FBO accomplished its puropse in eleven months be determinative of the duration of the violation? If such is the rule, it would, again, appear to reward the more effective and ruthless violators.

If past violations are in issue, the Administrator has some discretion in connection with the recovery of past payments. However, his discretion is limited by the requirement that he make a considered decision, on grounds consistent with the statute, whether to recover subsidies improperly paid.

It is established that "unjustly discriminatory and unfair" in the context of section 15 of the Shipping Act has the same meaning as that language in section 810 of the Merchant Marine Act. A finding of discrimination under the Shipping Act by the FMC must be given collateral estoppel effect in a proceeding under section 810 in the Maritime Administration, if the requisite privity and finality are present.

The potentially enormous economic ramifications of the Second Circuit's decisions are obvious,[illegible] particularly now when there is a great need to revitalize United States flag steamship lines. But, on the other hand, it is questionable whether shipowners who benefit from subsidy programs designed to foster United States flag shipping should be permitted to engage in practices detrimental to the health of the industry. What the Supreme Court's view of the question will be should a petition for certiorari be filed remains to be seen. In any case, the Sapphire litigation has raised many but resolved few of the fundamental issues in our maritime policy.

[illegible] The 1969 Annual Report of the Maritime Administration indicates that in 1965-1966, the period when the violation took place, over $550 million dollars in operating and construction differential subsidies were paid to the subsidized United States flag merchant marine. *See* Marad 1969, Year of Challenge 24, 72-73 (1969). Apparently the subsidies recoverable under the rule stated in the Second Circuit's opinion may amount to scores, if not hundreds, of millions of dollars.

Appendix Y—Letter From Congressman Paul N. McCloskey, Jr., Dated March 31, 1977

PAUL N. MCCLOSKEY, JR.
12th District, California

committee on
Government Operations
and
committee on
Merchant Marine
and Fisheries

205 Cannon Building
Washington, D.C. 20515
(202) 225-5411

District Office:
305 Grant Avenue
Palo Alto, California 94305
(415) 326-7383

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

March 31, 1977

Dear Colleague:

During the Merchant Marine Subcommittee's markup of the FY 78 Maritime Authorization bill last week, Chairman Murphy consented to my request that we *not* report the bill out of the full Committee until we have answers to the following questions:

(1) Why should we authorize $135 million for construction subsidies when there is significant disagreement between MARAD, the Department of Defense and OMB over the types of ships we should be building? This disagreement is especially disconcerting in light of the fact that the subsidy program is justified solely on national security grounds and DOD and MARAD have *never* given us their recommendations as to what kinds of ships the U.S. needs for its national security.

(2) Why should we authorize $372 million for operating subsidies for 73 companies without their clear assurance to the Committee that they

are not, and have not, engaged in the alleged "industry-wide" practices of illegal rebating? (Rebating, bribes, and kickbacks have recently been discovered to be a common practice among *nearly all* U.S. shipping companies. The FMC has opened over 100 files with respect to alleged rebating practices as a result of the Sea Land, Seatrain and U.S. Lines disclosures.)

(3) What has been the nature of corporate illegal campaign contributions to Members of Congress to "insure passage of favorable legislation?" (Attached to this letter is the *New York Times* article quoting U.S. Lines' statement to this effect, and an excerpt from the R. J. Reynolds filing with the SEC admitting $65,000—$95,000 in such contributions.)

It seems increasing clear that we should not again routinely ask the House to approve a Maritime Authorization bill when questions of this magnitude remain unanswered.

I write at this time merely to alert you to the fact that the industry with those oversight we are charged is one that appears sick, corrupt and fully capable of misapplication of the substantial Federal funds we have authorized for the past several years.

Sincerely,

Paul N. McCloskey, Jr.

Wednesday, January 19, 1977 The States-Item

New Orleans

SHIPPING REBATES ARE UNDER PROBE

By Patricia Gormin

Federal investigators predict an investigation of illegal rebate practices in the shipping industry will turn up a $200-million scandal linking carrier lines and shipping companies, many of which operate through the port of New Orleans, to under-the-table dealings.

William Jarrel Smith, director of the Bureau of Compliance of the Federal Maritime Commission (FMC), said his agency is pursuing a far-flung investigation devoted to finding malpractices.

The malpractices, he said, have been standard operating procedure for carriers, shippers and consignees, but federal law brands them clearly illegal.

INVOLVED IS the system of carriers giving cut-rate prices to favored shippers, in violation of the published tariffs and all transportation charges, Smith said.

The investigation was spurred by disclosures made by individual companies to the Securities and Exchange Commission and other government agencies. Already identified by the commission as one carrier which has engaged in the illegal rebate practice is Sea-Land Service Inc., which has agreed to pay $4 million in penalties for giving more than $19 million in rebates to customers.

That fine has been termed the largest civil penalty ever assessed by a transportation regulatory agency in the United States.

FMC officials have said that payments made by more than 275 American companies, turned up over the past two years, are specifically prohibited under the Shipping Act of 1916.

Sea-Land spokesmen say the company terminated the rebates last April, but add that the practices "are a way of life in foreign trade and create a serious predicament for American flag carriers, who must price their service on an equal, competitive basis with foreign carriers."

Henry G. Joffray, New Orleans associate port director, said the investigation will have virtually no impact on port business here.

"Foreign lines that serve U.S. ports are just as guilty as the domestic lines, if not more so," he said. The regulations forbidding discount practices among domestic lines are "unique to this country," he said.

Recent revelations of irregularities in the grain industry have not affected grain trade through the port, he said, and in fact, that business has increased 14 per cent. Similarly, he forecasts no downturn in business following disclosure of wrongdoing in the shipping industry.

SMITH SAID his bureau has "fairly substantiated payment of $100 million in illegal rebates—but that figure will go to $200 million when the investigation is completed."

So far, 25 carriers have been implicated, he said, "and the investigation has identified literally thousands of shippers and consignees who have accepted illegal rebates. There have been rebates in every trade route serving U.S. commerce."

A voluntary compliance program enables those accused of participating in the outlawed schemes to accept penalties, but "failing that," Smith explained, the FMC is empowered to subpoena witnesses, documents and pertinent evidence.

The six-month-old probe, according to its chief, has met little resistance from those involved. There is no formula by which penalties are assessed, but the "degree of hostility" of each company or individual involved does figure into the formula, he said.

Often, the rebate transaction occurred overseas and payments were made through foreign banks, in foreign currency, Smith said.

U.S. LINES ADMITS POLITICAL PAYMENTS AND REBATES

The United States Lines paid about $1.6 million in rebates to shippers from 1970 to 1973 and made a number of political payments in the period, it was announced yesterday.

Walter Kidde & Company, which owns the shipping line, said in a filing with the Securities and Exchange Commission that among payments uncovered in a special company investigation was $5,000 given "to an elected official of the United States Government in an attempt to insure passage of favorable legislation." The official was not identified and Kidde said the matter was under investigation by a Federal grand jury.

Also reported were "an undetermined appeal for political purposes," $34,500 which may have been used to resolve labor problems," and $4,838 to purchase a used Mercedes Benz auto for "officials of a foreign government shipping agency."

The $1.6 million was given to shippers, Mr. Kidde said, after competitors on North Atlantic routes "began to grant rebates or other forms of price discounts in an effort to secure additional cargo."

United States Lines at the time "faced a serious and continuing deterioration in its financial condition," Mr. Kidde said.

"Starting in about 1969, some former and present senior officers apparently determined that (the shipper) would grant rebates and price discounts where necessary to compete with other carriers engaged in similar practices," he said.

The rebates were made from three "off-book" bank accounts and Mr. Kidde said the shipper has ordered the practice terminated.

He also said $400,000 to $600,000 worth of rebates may have been granted to shippers in ways other than cash payments, including crediting sales agents with unearned commissions or short-weighing.

Some payments may have gone undiscovered, Mr. Kidde said, because a flood at the line's New York office destroyed certain records.

"Furthermore, in many cases the individuals interviewed were unable to recall specific details of transactions, many of which occurred six or more years ago," Mr. Kidde said.

Item 13. Other Materially Important Events

The following is the text of a press release issued by Registrant on May 28, 1976:

Colin Stokes, Chairman of the Board, and J. Paul Sticht, President of R. J. Reynolds Industries, Inc., reported today on the company's previously announced investigation into foreign payments problems, domestic political contributions, off-book funds and related matters. They disclosed problems principally in two separate and unrelated areas.

Appendix Y—Letter From Congressman Paul N. McCloskey, Jr., Dated March 31, 1977

They reported that the investigation to date indicated that corporate funds had been used for domestic political contributions during the period from January 1968 through early 1973 and that the total amount of such contributions over the five year period appeared to be between $65,000 and $90,000. The investigation indicated that the practice was stopped early in 1973. Corporate funds were diverted to an off-book fund for this purpose. The investigation to date has not indicated that any recipient had reason to know that corporate funds were involved. The company has not yet determined the tax consequences of the diversion but believes that they will not be material.

Stokes and Sticht stated that the participants in * * *

APPENDIX Z—DECISION DATED JULY 8, 1965

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

MA
No. A-17
Decided: July 8, 1965
Served: July 15, 1965

[¶ 2:810] *Territorial scope of Section 810 of 1936 Act.*

While the language of Section 810 of the 1936 Act could support an interpretation that the prohibitions against a subsidized operator conforming to any agreement with another carrier, or engaging in any practice in concert with another carrier, which is unjustly discriminatory or unfair to any other U.S. carrier exclusively employing vessels on any established trade route from and to a United States port, are not applicable to foreign-to-foreign segments of essential trade routes, the legislative history of the section shows that the section does apply to such segments. Furthermore, the Federal Maritime Board in 1954 and in 1956 so interpreted the section. It would be senseless to permit discriminatory practices on one segment of an essential trade route and condemn them on another.

[¶ 2:810] *Section 810 vis-a-vis Section 15*

The limited territorial scope of Section 15 of the 1916 Act does not attach to Section 810 of the 1936 Act. The power of Congress to regulate is in no sense limited by any requirement that the conferences regulated involve an American port. When an attempt was made in 1938 to repeal Section 810, the proponents of repealer claimed that the section was redundant because Section 15 was adequate to curb the abuses which had prompted enact-

ment of Section 810. While no final conclusion can be drawn from Congress' failure to repeal the statute, it is some indication that Congress recognized a difference in the territorial applicability of each.

[¶ 2:810, ¶ 160:18] *Obligation of Maritime to enforce Section 810*

The fact that other American operators were disinclined to complain of the continued membership of a subsidized operator in a conference, in violation of Section 810, had no effect whatsoever on the Maritime Administration's obligation to cease subsidy payments to a violator.

[¶ 2:810] *Applicability of Section 810 to non-voting member of conference.*

A subsidized operator's continued membership in a conference governing a foreign-to-foreign trade which was a segment of an essential United States trade route would be in violation of Section 810, where other U.S.-flag operators, entitled to the protection of the section, had been denied conference membership. As to the contention that the conference agreement was not of itself unjustly discriminatory, that the operator was a non-voting member and, therefore, that it was not a party to and did not conform to any discriminatory practices, Section 810 refers to an operator continuing as a party to or conforming to any agreement which is injustly discriminatory, and such language is reflected in each ODS agreement. While the operator had no voting rights, it admitted that it was a party to and conformed to the agreement. Section 810 makes no mention of voting, nor does it divide membership into types or classes.

OPINION OF THE MARITIME ADMINISTRATOR, NICHOLAS JOHNSON

This proceeding involves the interpretation of Section 810, Merchant Marine Act, 1936, as amended (46 USC § 1227).

On July 24, 1962, American President Lines, Ltd. (hereinafter referred to as "APL") requested Maritime Administration approval of its entry as an associate member in the Japan/Saigon Freight Conference (hereinafter, "the Conference") under Article II-18(c) of Operating-Differential Subsidy Contract FBM—76. The Office of Government Aid, Maritime Administration, advised in a letter dated August 3, 1962, that entry was approved subject to the submission of the Conference Agreement for review by the Maritime Administration, but cautioned: "Based upon this review, American President Lines, Ltd., may be required to amend, modify, terminate or withdraw from said agreement".

Under the Agreement, APL may carry a maximum of 800 revenue tons of cargo per month between Japan and Saigon on any one of its three services on essential Trade Route No. 29: (1) round-the-world service; (2) California to the Far East service; and (3) California to Indonesia/Malaysia via Japan service.

Pacific Far East Line, Inc., Waterman Steamship Corporation and American Mail Line Ltd., which are in a position to serve the trade between Japan and Saigon while engaged in their respective operations over trade routes found to be essential pursuant to Section 211(a) (46 USC § 1121(a)), Merchant Marine Act, 1936, as amended (hereinafter, "the Act"), have applied for membership in the Conference (Petition for Declaratory Order, p. 3). All have been rejected, with at least one American-flag operator, Pacific Far East Line, Inc., being denied membership while APL was an associate of the Conference (ibid).

On May 28, 1964, the Office of Government Aid, acting pursuant to authority delegated to it by Administrator's Order No. 58, as amended (March 22, 1963), directed APL to withdraw from the Conference for the reason that its continued membership would violate Section 810 of the Act. This directive was stayed on July 2, 1964 at APL's formal request. Earlier, in a conference of APL counsel and Maritime Administration officials, the former revealed their intention to make such a request and to file a petition for declaratory order. The petition, in the form of an adversary brief, was submitted to me on July 17, 1964.

In a letter dated January 11, 1965 and directed to APL counsel, I indicated my decision to undertake discretionary review of the order to withdraw in light of its special importance to the maritime industry and the proper administration of the maritime laws of the United States. Attached to that letter was a memorandum of law prepared by the Office of General Counsel, Maritime Administration, in answer to the arguments contained in the APL petition. Counsel for APL submitted a reply memorandum.

Section 810 of the Act (46 USC § 1227) reads in pertinent part:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI or for any charterer of vessels under Title VII of this Act, to continue as a party to or conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels

> registered under the laws of the United States or any established trade route from and to a United States port or ports."

APL contends: (1) that Section 810 of the Act was incorrectly applied to it because that section extends to conferences governing trades between United States and foreign ports only and not those between foreign ports; and (2) that the Conference Agreement to which APL is a non-voting party is not *of itself* "unjustly discriminatory or unfair" within the statutory prohibition, and that without the power to vote APL is not a "party to" nor does it "conform to" any "unjustly discriminatory or unfair" practices of the voting members of the Conference.

After reviewing the arguments and the legislative and administrative histories of Section 810 of the Act, I am constrained to hold, for the reasons stated below, that Section 810 of the Act (1) applies to the foreign-to-foreign segments of trade routes found essential to the foreign commerce of the United States, and (2) is violated by mere membership of an American line in a conference that excludes other American-flag operators.

APL argues that Congress intended Section 810 of the Act to apply only to United States-to-foreign trade. The text of Section 810 of the Act does not delimit the trades to which it applies. It refers to ". . . *any contractor* . . ." receiving operating-differential subsidy that continues to be a party to or conforms to ". . . any agreement with another carrier or carriers by water . . ." or engages in ". . . *any practice* in concert with . . ." such other carriers ". . . which is unjustly discriminatory or unfair . . ." to any citizen employing American-flag vessels on an essential United States trade route (emphasis supplied). There thus is no explicit textual support for the position of APL, although the language could

support that interpretation if there were other reasons to so read it. Since this matter is one of statutory interpretation, recourse to the legislative history is necessary to determine Congressional intent.

APL contends that since abuses within a conference engaged in United States-to-foreign trade prompted adoption of the second, it is limited in application only to such trades (Petition for Declaratory Order, pp. 10-11). At the time Congress was considering the bill which was soon to become the Merchant Marine Act, 1936, there was in operation the South African Conference composed of six foreign lines and one subsidized American operator. On several occasions the Robin Line, an unsubsidized American-flag operator in competition with conference members between New York and South Africa, applied for and was denied membership. The purpose of the conference was two-fold: (1) to impede entry into the trade by non-conference American operators; and (2) to divert South African trade from the port of New York to various Canadian ports. (Hearings on S. 3500, S. 4110 and S. 4111, Senate Commerce Committee, 74th Cong., 2d Sess., pp. 183-85 (1936); 80 Cong. Rec. 9921-22 (1936)).

During the debate on H.R. 8555 (forerunner of the 1936 Act), Senator O'Mahoney cited the South African Conference and asked Senator Copeland, sponsor of the bill, whether or not there was any provision therein that would prevent American subsidized lines from participating in such exclusionary practices against other American operators (80 Cong. Rec. 9921 (1936)). Senator Copeland replied that he did not approve of such discriminatory practices, but felt the Shipping Act, 1916 [Section 15], afforded sufficient protection in that the then United States Shipping Board had the power to approve, disapprove, or modify any (including a conference agreement if it finds such agreement to be ". . . unjustly discriminatory or unfair . . ." (80 Cong. Rec. 9922 (1936)).

Actually, the Shipping Act, 1916, contained several interlocking sections bearing on the problem being discussed. Section 14 prohibited common carriers by water between United States and foreign ports from engaging in certain enumerated practices, e.g., deferred rebates and the use of "fighting ships". "Dual rate contract arrangements" approved by the appropriate regulatory body pursuant to Section 15 of the 1916 Act were exempted. Section 15 of the 1916 Act imposed restrictions upon American-flag operators in the foreign commerce of the United States by providing for approval, modification and disapproval of any agreements they might enter into, including conference agreements. Further, Section 14a of the 1916 Act (added in 1920) directed the Secretary of Commerce to deny any foreign operator entry into United States ports if such operator is in violation of Section 14 or is a party to any combination, agreement or understanding affecting transportation of person or property *between foreign ports* which involves deferred rebates or any other unfair practice specified in Section 14 *and* denies membership upon equal terms to an American-flag operator.

Senator Copeland was forced to concede that the practices alluded to by Senator O'Mahoney were still taking place despite the existence of the above-mentioned laws. As an indication that additional legislation was felt necessary to circumscribe a *subsidized* operator's conference activities, floor discussion ended with this exchange between the two senators:

> "Mr. O'Mahoney: Would it not be a simple matter to *provide an amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American Line?"*
> "Mr. Copeland: Let us find out. I will consult the

experts and see if they can choose language to cover what the Senator has in mind." (80 Cong. Rec. 9922 (1936), emphasis supplied)

Senator O'Mahoney's solution to this problem was the amendment which became Section 810 of the Act. In his introductory comments, Senator O'Mahoney expressed dissatisfaction with the lax enforcement of the existing laws regulating conferences *and specifically quoted Section 14a of the 1916 Act which related to foreign-to-foreign conferences.* He then stated in unequivocal terms:

> "It is my purpose in presenting this amendment [Section 810 of the Act] to make it clear to the Maritime Commission that it is the *intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with others lines, including those operating under foreign flags, to crush American competition.*" (80 Cong. Rec. 10075-76 (1936), emphasis supplied)

Neither the policy underlying Section 810 of the Act nor the language used by Senator O'Mahoney indicates that any distinction should be drawn between United States-to-foreign and foreign-to-foreign segments of an essential route in United States commerce.

> "It is represented, on apparently good authority, that American citizens . . . *have applied for admission to conferences of which foreign lines are members, and have been denied that admission.* Without the amendment which is proposed [Section 810 of the Act], therefore, we should have the anomalous condition that the United States would be in the position of paying a subsidy to an American line *which was in truth and in fact engaged in a conspiracy with foreign lines to discriminate against another American line.* This amendment will, I think, obviate that very *unwise and improper and unjustifiable* condition."
>
> "I am told that the Shipping Board in the past has not inforced the law [Section 14a of the 1916 Act] which so clearly provides that American lines, on application, are entitled to admission to any conference. *A closed combination of this kind is indefensible, and surely should not be supported by the Treasury of the United States.*" (Ibid., emphasis supplied)

Furthermore, the Federal Maritime Board ("FMB") has uttered strong dicta to the effect that Section 810 of the Acts governs foreign-to-foreign trade (Isbrandtsen Co., Inc. v. American Export Lines, Inc., 4 FMB 442 (1954)). In that case Isbrandtsen alleged that American Export violated Section 810 of the Act and certain articles of the subsidy contract by entering into freight agreements for exclusive carriage of cotton from Egypt to India and Pakistan. The proceeding was discontinued but in so ordering the FMB found opportunity to discuss the legislative intent in Section 810 of the Act, as reflected in the two quotations from the Congressional Record given immediately above. It concluded that the unjust discrimination noted was the exclusion of "a United States-flag line from a conference *operating between foreign ports. . . .*" (Id. at 453, emphasis supplied). Opened for reargument and reconsideration, the proceeding was discontinued again and Isbrandtsen's complaint dismissed but not before the WMB noted:

> ". . . [A]s discussed in our earlier report, the prohibition of Section 810 is aimed at preventing the exclusion of American-flag carriers from participation in *conferences or agreements among carriers*

> *operating between foreign ports.*" (Isbrandtsen Co., Inc. v. American Export Lines, Inc., 4 FMB 772, 784 (1956)) (Emphasis supplied)

In extending operating-differential subsidy, Congress intended to strengthen the American Merchant Marine by making it competitive with foreign lines. It seemed inconsistent with this objective to subsidize an operator, which, in collusion with foreign lines, discriminates against another American-flag operator. In fact, the subsidized American operators of today, including APL, are contractually bound to cooperate with and show favoritism to other American operators, rather than foreign persons or entities, with the objective of developing the American Merchant Marine (Article II-3, Operating-Differential Subsidy Contract Standard Part II, filed in the Office of the Secretary, Maritime Administration, Washington, D.C.).

Moreover, it would appear senseless to permit discriminatory practices on one segment of an essential trade route and condemn them on another segment which happens to lie between the United States and first or last foreign port of call. This conclusion is buttressed by Section 14a, Shipping Act, 1916, noted above, which provides for the closing of United States ports to foreign operators who enter in combinations affecting trade between foreign ports which result in unfair, discriminatory practices, and who deny Americans equal standing under such agreements. It would be incongruous to suppose Congress would visit such a severe penalty on foreign members of a conference discriminating against American-flag operators in foreign-to-foreign trade and allow a subsidized American operator to participate in the same conference with impunity. If anything is to be expected, it is that American subsidized operators owe a special obligation

to refrain from discrimination against other American operators. The operating subsidy contract, Article II-3, noted above, contractually binds the operator to this expectation.

APL also argues that the limited territorial scope of Section 15, Shipping Act, 1916 attached to Section 810 of the Act (Petition for Declaratory Order, pp. 11-12; Reply Memorandum, pp. 5-6).

There is no doubt that the United States can regulate and exert jurisdiction over its citizens anywhere in the world (Blackner v. United States, 284 U.S. 421 (1932)). It is on this principle that the Congress can impose conditions upon any American-flag operator roving the world's sea lanes.

Thus, the *power* of Congress to regulate is in no sense limited by any requirement that the conferences regulated involve an American port. APL urges that Congress *intended* to so limit Section 810 of the Act and refers to the attempted repeal in 1938. The proponents of repealer claimed that the section was redundant became Section 15 of the 1916 Act was adequate to curb the abuses which had prompted the former's enactment. In other words, the two statutes were co-extensive. While no final conclusions can be drawn from Congress' failure to repeat the statute, it is some indication that Congress did recognize a difference in the territorial applicability of each.

APL also argues that even if Section 810 of the Act can be construed as applying to foreign-to-foreign trade conferences it should be so read, in the absence of clear legislative intent, when the result is to place American operators at a severe disadvantage in trades unrelated to the commerce of the United States (Petition for Declaratory Order, pp. 8-9); further, that to force withdrawal of an American-flag line from a foreign conference will

diminish the effectiveness of the American Merchant Marine and remove the possibility that such a member operator could influence the acceptance of other American-flag lines (Id. at pp. 9 and 16).

The first argument begs the question, for clearly the trade covered by the Conference Agreement is related to the commerce of the United States. When shippers agree to use certain preferred carriers for the movement of cargo between given points, the amount available to American-flag vessels is necessarily curtailed. In addition, the subject segment was determined to be essential to the foreign commerce of the United States, pursuant to Section 211(a) of the Act, else APL would not be eligible for the subsidy it claims for the time spent at, and passing between, the two points.

The charge that the forced withdrawal of APL from the Conference will result in a "disadvantage to" and "diminution of American Merchant Marine effectiveness" is simply answered: the Congress was aware of these possibilities of the times of enactment (80 Cong. Rec. 10076 (1936)) and attempted repeal (Hearings on H.R. 8532, House Merchant Marine and Fisheries Committee, 75th Cong., 2d Sess., pp. 13-14 (1938). Nevertheless, the section was passed and has been retained.

APL claims that it has actively sought membership for other American-flag operators and tthat it expressly rejected, as a condition of membership, the obligation of voting to exclude other American operators (Petition for Declaratory Order, p. 15; Reply Memorandum, p. 11). However laudable such gestures might be, the primary purpose of Section 810 was to deny the financial support of the United States Treasury to any American operator that was willing to be a party to any combination effectively causing detriment to other American operators (80

Cong. Rec. 10075-76 (1936)). This statement of the basic purpose of Section 810 of the Act also serves as reply to the suggestion offered by APL that the Maritime Administration should ignore its responsibilities under Section 810 because of the disinclination of four other American operators in a position to serve the trade to complain of continued APL membership in the Conference (Letter of Late-filed Advice, February 8, 1965). The concluding paragraph of Section 810 of the Act, not recited heretofore, describes the possible penalties for violation of the first part:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The Maritime Administration is obliged to stop subsidy payments to violators of this section. Separate and distinct from this is the remedy of a private party. The expression of four other operators, to the effect that they don't care whether APL continues its Conference membership, addresses itself only to this private remedy. It merely means that some potential suitors are disinclined to sue APL. This has no effect whatsoever on the Maritime Administration's *obligation to cease subsidy payments to a violator.*

As to the second main issue, *APL contends* that it has not, nor could it have, engaged in conduct prohibited by Section 810 of the Act. Refining this contention, it is argued that (1) the Agreement is not *of itself* unjustly discriminatory or unfair to other American-flag lines, (2) *APL is a non-voting, associate member of the Conference and, therefore,* (3) *being a limited party to the Agreement, APL is not a party to nor does it conform to any practices of the other Conference members which are "probably 'unjustly discriminatory and unfair', under the standards of the United States statute"* (*Petition for Declaratory Order, pp. 14-15*).

The importance of reading this language in accord with its plain meaning is emphasized by the penal character of Section 810 of the Act, which begins, "It shall be unlawful. . . ." This phrase immediately brings into play Section 806(b) of the Act which reads, in pertinent part:

> "Whenever any corporation is found guilty of any act or acts declared in this Act to be unlawful, such corporation shall be punished by a fine of not more than $25,000."

A substantial ground for rejecting this contention is found in the very language of the Act, Section 810, which reads, in pertinent part:

> *"It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI . . . to continue as a party to or to conform to any agreement* . . ., or to engage in any practice in concert any other citizen of the United States. . . ." (emphasis supplied)

This language, furthermore, is reflected in each operating-differential subsidy agreement thus making the grant of subsidy conditional upon the operator not continuing to be

a party to or conforming to any agreement which is unjustly discriminatory or unfair to any other American citizen (Article II-18(b), Operating-Differential Subsidy Contract Standard Part II, filed in the Office of the Secretary, Maritime Administration, Washington, D.C.).

While APL has no voting rights, it has admitted being a party to and conforming to the Conference Agreement (Reply Memorandum, p. 11). The statute makes no mention of voting, nor does it divide membership into types and classes. Further, APL has availed itself of the benefits of the rules and regulations promulgated by the voting members of the Conference and agreed to be bound by those rules and regulations under penalty of fine.[1]

---

[1] Selected passages from the Conference Agreement and Adenda:

> "Japan/Saigon Freight Conference—Agreement . . . 1. a. The Lines agree to charge strictly the applicable rates of freight in the Conference Tariff and amendments thereto and to adhere to all the other conditions stated therein; they also undertake to observe such regulations and/or amendments as may be agreed upon from time to time."
>
> * * * * *
>
> "c. The Lines agree that they will insure that their offices, agents, sub-agents and all other connections in any way with their business in Japan or Saigon or elsewhere adhere strictly to this agreement."
>
> * * * * *
>
> "3. . . . If it is decided by a two-thirds majority vote of the Members that a breach of this Agreement has been committed, . . . [and if] the Member so charged fails to submit an explanation satisfactory to a two-thirds majority of the Members . . . then the offending Member shall pay to the Conference Secretaries a sum amounting to five times the amount of the freight involved subject to a maximum of HK $5,000. — or its equivalent."
>
> (A second breach within six months makes the offender liable to a fine of HK $30,000. — or its equivalent).
>
> * * * * *

[Footnote continued on following page]

APL may not ignore the plain language and intent of the section by declining the vote and letting the other members pursu their discriminatory practices. Clearly then, APL's continued membership would do violence to Section 810 of the Act.

In view of the foregoing, I conclude that Section 810 of the Act applies to the Japan/Saigon Freight Conference for the reason that American-flag operators, which act as common carriers and exclusively employ vessels under United States registry on an established trade route from and to a United States port or ports, have been denied membership in that Conference. *Consequently, APL's continued membership in the Japan/Saigon Freight Conference would be in violation of Section 810 of the Act and subject it to the severe penalties prescribed by Congress, most prominently, the loss of subsidy.*

Accordingly, the order to withdraw, dated May 28, 1964 and stayed on July 2, 1964, is hereby reinstated effective the date this decision is served upon the petitioner.

NOTE:

The letter of May 28, 1964, ordering APL to withdraw from the Conference was, as stated in Docket No. A-17, "stayed on July 2, 1964".

"9. . . . . The Lines agree to observe faithfully both the letter and the spirit of this Agreement."

"10. . . . It is also agreed that decisions as to admission of new members shall be determined by three-fourths majority of all Members entitled to vote."

"Japan/Saigon Freight Conference Agreement Addendum No. 3."

* * * * *

"3. American President Lines, Ltd. agree to and shall strictly observe the regulations of the Conference Agreement and addenda thereto."

The Administrator's decision in Docket No. A-17 reinstates the order of May 28, 1964, upon service and receipt of his decision.

The Order of May 28, 1964, thereby reinstated, is quoted in pertinent part, as follows:

> "You are hereby directed immediately to take such action as is required by the terms of the Japan/Saigon Freight Conference to withdraw from said agreement.
>
> "Please furnish this Office with a copy of such correspondence as may be exchanged with the conference concerning your withdrawal and advise this Office when your withdrawal becomes effective."

James S. Dawson, Jr.
Secretary
Maritime Administration

July 15, 1965